COMMENTARY ON ARTICLE 5 CONCERNING THE DEFINITION OF PERMANENT ESTABLISHMENT

1. The main use of the concept of a permanent establishment is to determine the right of a Contracting State to tax the profits of an enterprise of the other Contracting State. Under Article 7 a Contracting State cannot tax the profits of an enterprise of the other Contracting State unless it carries on its business through a permanent establishment situated therein.

(Replaced on 11 April 1977; see HISTORY)

1.1 Before 2000, income from professional services and other activities of an independent character was dealt under a separate Article, *i.e.* Article 14. The provisions of that Article were similar to those applicable to business profits but it used the concept of fixed base rather than that of permanent establishment since it had originally been thought that the latter concept should be reserved to commercial and industrial activities. The elimination of Article 14 in 2000 reflected the fact that there were no intended differences between the concepts of permanent establishment, as used in Article 7, and fixed base, as used in Article 14, or between how profits were computed and tax was calculated according to which of Article 7 or 14 applied. The elimination of Article 14 therefore meant that the definition of permanent establishment became applicable to what previously constituted a fixed base.

(Added on 29 April 2000; see HISTORY)

Paragraph 1

2. Paragraph 1 gives a general definition of the term "permanent establishment" which brings out its essential characteristics of a permanent establishment in the sense of the Convention, *i.e.* a distinct "situs", a "fixed place of business". The paragraph defines the term "permanent establishment" as a fixed place of business, through which the business of an enterprise is wholly or partly carried on. This definition, therefore, contains the following conditions:

— the existence of a "place of business", *i.e.* a facility such as premises or, in certain instances, machinery or equipment;

— this place of business must be "fixed", *i.e.* it must be established at a distinct place with a certain degree of permanence;

— the carrying on of the business of the enterprise through this fixed place of business. This means usually that persons who, in one way or another, are dependent on the enterprise (personnel) conduct the

business of the enterprise in the State in which the fixed place is situated.

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(Replaced on 11 April 1977; see HISTORY)

3. It could perhaps be argued that in the general definition some mention should also be made of the other characteristic of a permanent establishment to which some importance has sometimes been attached in the past, namely that the establishment must have a productive character, *i.e.* contribute to the profits of the enterprise. In the present definition this course has not been taken. Within the framework of a well-run business organisation it is surely axiomatic to assume that each part contributes to the productivity of the whole. It does not, of course, follow in every case that because in the wider context of the whole organisation a particular establishment has a "productive character" it is consequently a permanent establishment to which profits can properly be attributed for the purpose of tax in a particular territory (see Commentary on paragraph 4).

(Amended on 11 April 1977; see HISTORY)

4. The term "place of business" covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose. A place of business may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal. It is immaterial whether the premises, facilities or installations are owned or rented by or are otherwise at the disposal of the enterprise. A place of business may thus be constituted by a pitch in a market place, or by a certain permanently used area in a customs depot (*e.g.* for the storage of dutiable goods). Again the place of business may be situated in the business facilities of another enterprise. This may be the case for instance where the foreign enterprise has at its constant disposal certain premises or a part thereof owned by the other enterprise.

(Replaced on 11 April 1977; see HISTORY)

4.1 As noted above, the mere fact that an enterprise has a certain amount of space at its disposal which is used for business activities is sufficient to constitute a place of business. No formal legal right to use that place is therefore required. Thus, for instance, a permanent establishment could exist where an enterprise illegally occupied a certain location where it carried on its business.

(Added on 28 January 2003; see HISTORY)

4.2 Whilst no formal legal right to use a particular place is required for that place to constitute a permanent establishment, the mere presence of an

enterprise at a particular location does not necessarily mean that that location is at the disposal of that enterprise. These principles are illustrated by the following examples where representatives of one enterprise are present on the premises of another enterprise. A first example is that of a salesman who regularly visits a major customer to take orders and meets the purchasing director in his office to do so. In that case, the customer's premises are not at the disposal of the enterprise for which the salesman is working and therefore do not constitute a fixed place of business through which the business of that enterprise is carried on (depending on the circumstances, however, paragraph 5 could apply to deem a permanent establishment to exist).

(Added on 28 January 2003; see HISTORY)

4.3 A second example is that of an employee of a company who, for a long period of time, is allowed to use an office in the headquarters of another company (*e.g.* a newly acquired subsidiary) in order to ensure that the latter company complies with its obligations under contracts concluded with the former company. In that case, the employee is carrying on activities related to the business of the former company and the office that is at his disposal at the headquarters of the other company will constitute a permanent establishment of his employer, provided that the office is at his disposal for a sufficiently long period of time so as to constitute a "fixed place of business" (see paragraphs 6 to 6.3) and that the activities that are performed there go beyond the activities referred to in paragraph 4 of the Article.

(Added on 28 January 2003; see HISTORY)

4.4 A third example is that of a road transportation enterprise which would use a delivery dock at a customer's warehouse every day for a number of years for the purpose of delivering goods purchased by that customer. In that case, the presence of the road transportation enterprise at the delivery dock would be so limited that that enterprise could not consider that place as being at its disposal so as to constitute a permanent establishment of that enterprise.

(Added on 28 January 2003; see HISTORY)

4.5 A fourth example is that of a painter who, for two years, spends three days a week in the large office building of its main client. In that case, the presence of the painter in that office building where he is performing the most important functions of his business (*i.e.* painting) constitute a permanent establishment of that painter.

(Added on 28 January 2003; see HISTORY)

4.6 The words "through which" must be given a wide meaning so as to apply to any situation where business activities are carried on at a particular location that is at the disposal of the enterprise for that purpose. Thus, for

instance, an enterprise engaged in paving a road will be considered to be carrying on its business "through" the location where this activity takes place.

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(Added on 28 January 2003; see HISTORY)

5. According to the definition, the place of business has to be a "fixed" one. Thus in the normal way there has to be a link between the place of business and a specific geographical point. It is immaterial how long an enterprise of a Contracting State operates in the other Contracting State if it does not do so at a distinct place, but this does not mean that the equipment constituting the place of business has to be actually fixed to the soil on which it stands. It is enough that the equipment remains on a particular site (but see paragraph 20 below).

(Amended on 23 July 1992; see HISTORY)

5.1 Where the nature of the business activities carried on by an enterprise is such that these activities are often moved between neighbouring locations, there may be difficulties in determining whether there is a single "place of business" (if two places of business are occupied and the other requirements of Article 5 are met, the enterprise will, of course, have two permanent establishments). As recognised in paragraphs 18 and 20 below a single place of business will generally be considered to exist where, in light of the nature of the business, a particular location within which the activities are moved may be identified as constituting a coherent whole commercially and geographically with respect to that business.

(Added on 28 January 2003; see HISTORY)

5.2 This principle may be illustrated by examples. A mine clearly constitutes a single place of business even though business activities may move from one location to another in what may be a very large mine as it constitutes a single geographical and commercial unit as concerns the mining business. Similarly, an "office hotel" in which a consulting firm regularly rents different offices may be considered to be a single place of business of that firm since, in that case, the building constitutes a whole geographically and the hotel is a single place of business for the consulting firm. For the same reason, a pedestrian street, outdoor market or fair in different parts of which a trader regularly sets up his stand represents a single place of business for that trader.

(Added on 28 January 2003; see HISTORY)

5.3 By contrast, where there is no commercial coherence, the fact that activities may be carried on within a limited geographic area should not result in that area being considered as a single place of business. For example, where a painter works successively under a series of unrelated contracts for a number of unrelated clients in a large office building so that it cannot be said

that there is one single project for repainting the building, the building should not be regarded as a single place of business for the purpose of that work. However, in the different example of a painter who, under a single contract, undertakes work throughout a building for a single client, this constitutes a single project for that painter and the building as a whole can then be regarded as a single place of business for the purpose of that work as it would then constitute a coherent whole commercially and geographically.

(Added on 28 January 2003; see HISTORY)

5.4 Conversely, an area where activities are carried on as part of a single project which constitutes a coherent commercial whole may lack the necessary geographic coherence to be considered as a single place of business. For example, where a consultant works at different branches in separate locations pursuant to a single project for training the employees of a bank, each branch should be considered separately. However if the consultant moves from one office to another within the same branch location, he should be considered to remain in the same place of business. The single branch location possesses geographical coherence which is absent where the consultant moves between branches in different locations.

(Added on 28 January 2003; see HISTORY)

5.5 Clearly, a permanent establishment may only be considered to be situated in a Contracting State if the relevant place of business is situated in the territory of that State. The question of whether a satellite in geostationary orbit could constitute a permanent establishment for the satellite operator relates in part to how far the territory of a State extends into space. No member country would agree that the location of these satellites can be part of the territory of a Contracting State under the applicable rules of international law and could therefore be considered to be a permanent establishment situated therein. Also, the particular area over which a satellite's signals may be received (the satellite's "footprint") cannot be considered to be at the disposal of the operator of the satellite so as to make that area a place of business of the satellite's operator.

(Added on 22 July 2010; see HISTORY)

6. Since the place of business must be fixed, it also follows that a permanent establishment can be deemed to exist only if the place of business has a certain degree of permanency, *i.e.* if it is not of a purely temporary nature. A place of business may, however, constitute a permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time. It is sometimes difficult to determine whether this is the case. Whilst the practices followed by member countries have not

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been consistent in so far as time requirements are concerned, experience has shown that permanent establishments normally have not been considered to exist in situations where a business had been carried on in a country through a place of business that was maintained for less than six months (conversely, practice shows that there were many cases where a permanent establishment has been considered to exist where the place of business was maintained for a period longer than six months). One exception has been where the activities were of a recurrent nature; in such cases, each period of time during which the place is used needs to be considered in combination with the number of times during which that place is used (which may extend over a number of years). Another exception has been made where activities constituted a business that was carried on exclusively in that country; in this situation, the business may have short duration because of its nature but since it is wholly carried on in that country, its connection with that country is stronger. For ease of administration, countries may want to consider these practices when they address disagreements as to whether a particular place of business that exists only for a short period of time constitutes a permanent establishment.

(Amended on 28 January 2003; see HISTORY)

6.1 As mentioned in paragraphs 11 and 19, temporary interruptions of activities do not cause a permanent establishment to cease to exist. Similarly, as discussed in paragraph 6, where a particular place of business is used for only very short periods of time but such usage takes place regularly over long periods of time, the place of business should not be considered to be of a purely temporary nature.

(Added on 28 January 2003; see HISTORY)

6.2 Also, there may be cases where a particular place of business would be used for very short periods of time by a number of similar businesses carried on by the same or related persons in an attempt to avoid that the place be considered to have been used for more than purely temporary purposes by each particular business. The remarks of paragraph 18 on arrangements intended to abuse the twelve month period provided for in paragraph 3 would equally apply to such cases.

(Added on 28 January 2003; see HISTORY)

6.3 Where a place of business which was, at the outset, designed to be used for such a short period of time that it would not have constituted a permanent establishment but is in fact maintained for such a period that it can no longer be considered as a temporary one, it becomes a fixed place of business and thus — retrospectively — a permanent establishment. A place of business can also constitute a permanent establishment from its inception even though it existed, in practice, for a very short period of time, if as a consequence of

special circumstances (*e.g.* death of the taxpayer, investment failure), it was prematurely liquidated.

(Added on 28 January 2003; see HISTORY)

7. For a place of business to constitute a permanent establishment the enterprise using it must carry on its business wholly or partly through it. As stated in paragraph 3 above, the activity need not be of a productive character. Furthermore, the activity need not be permanent in the sense that there is no interruption of operation, but operations must be carried out on a regular basis.

(Replaced on 11 April 1977; see HISTORY)

8. Where tangible property such as facilities, industrial, commercial or scientific (ICS) equipment, buildings, or intangible property such as patents, procedures and similar property, are let or leased to third parties through a fixed place of business maintained by an enterprise of a Contracting State in the other State, this activity will, in general, render the place of business a permanent establishment. The same applies if capital is made available through a fixed place of business. If an enterprise of a State lets or leases facilities, ICS equipment, buildings or intangible property to an enterprise of the other State without maintaining for such letting or leasing activity a fixed place of business in the other State, the leased facility, ICS equipment, building or intangible property, as such, will not constitute a permanent establishment of the lessor provided the contract is limited to the mere leasing of the ICS equipment, etc. This remains the case even when, for example, the lessor supplies personnel after installation to operate the equipment provided that their responsibility is limited solely to the operation or maintenance of the ICS equipment under the direction, responsibility and control of the lessee. If the personnel have wider responsibilities, for example, participation in the decisions regarding the work for which the equipment is used, or if they operate, service, inspect and maintain the equipment under the responsibility and control of the lessor, the activity of the lessor may go beyond the mere leasing of ICS equipment and may constitute an entrepreneurial activity. In such a case a permanent establishment could be deemed to exist if the criterion of permanency is met. When such activity is connected with, or is similar in character to, those mentioned in paragraph 3, the time limit of twelve months applies. Other cases have to be determined according to the circumstances.

(Amended on 23 July 1992; see HISTORY)

9. The leasing of containers is one particular case of the leasing of industrial or commercial equipment which does, however, have specific features. The question of determining the circumstances in which an

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enterprise involved in the leasing of containers should be considered as having a permanent establishment in another State is more fully discussed in a report entitled "The Taxation of Income Derived from the Leasing of Containers."[1]

(Replaced on 23 July 1992; see HISTORY)

9.1 Another example where an enterprise cannot be considered to carry on its business wholly or partly through a place of business is that of a telecommunications operator of a Contracting State who enters into a "roaming" agreement with a foreign operator in order to allow its users to connect to the foreign operator's telecommunications network. Under such an agreement, a user who is outside the geographical coverage of that user's home network can automatically make and receive voice calls, send and receive data or access other services through the use of the foreign network. The foreign network operator then bills the operator of that user's home network for that use. Under a typical roaming agreement, the home network operator merely transfers calls to the foreign operator's network and does not operate or have physical access to that network. For these reasons, any place where the foreign network is located cannot be considered to be at the disposal of the home network operator and cannot, therefore, constitute a permanent establishment of that operator.

(Added on 22 July 2010; see HISTORY)

10. The business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (*e.g.* dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorised to conclude contracts if he works at the fixed place of business (see paragraph 35 below). But a permanent establishment may nevertheless exist if the business of the enterprise is carried on mainly through automatic equipment, the activities of the personnel being restricted to setting up, operating, controlling and maintaining such equipment. Whether or not gaming and vending machines and the like set up by an enterprise of a State in the other State constitute a permanent establishment thus depends on whether or not the enterprise carries on a business activity besides the initial setting up of the machines. A permanent establishment does not exist if the enterprise merely sets up the machines and then leases the machines to other enterprises. A permanent establishment may exist, however, if the enterprise which sets up the machines also operates and maintains them for its own account. This also

1 Reproduced in Volume II at page R(3)-1.

applies if the machines are operated and maintained by an agent dependent on the enterprise.

(Renumbered and amended on 23 July 1992; see HISTORY)

11. A permanent establishment begins to exist as soon as the enterprise commences to carry on its business through a fixed place of business. This is the case once the enterprise prepares, at the place of business, the activity for which the place of business is to serve permanently. The period of time during which the fixed place of business itself is being set up by the enterprise should not be counted, provided that this activity differs substantially from the activity for which the place of business is to serve permanently. The permanent establishment ceases to exist with the disposal of the fixed place of business or with the cessation of any activity through it, that is when all acts and measures connected with the former activities of the permanent establishment are terminated (winding up current business transactions, maintenance and repair of facilities). A temporary interruption of operations, however, cannot be regarded as a closure. If the fixed place of business is leased to another enterprise, it will normally only serve the activities of that enterprise instead of the lessor's; in general, the lessor's permanent establishment ceases to exist, except where he continues carrying on a business activity of his own through the fixed place of business.

(Renumbered on 23 July 1992; see HISTORY)

Paragraph 2

12. This paragraph contains a list, by no means exhaustive, of examples, each of which can be regarded, *prima facie*, as constituting a permanent establishment. As these examples are to be seen against the background of the general definition given in paragraph 1, it is assumed that the Contracting States interpret the terms listed, "a place of management", "a branch", "an office", etc. in such a way that such places of business constitute permanent establishments only if they meet the requirements of paragraph 1.

(Renumbered on 23 July 1992; see HISTORY)

13. The term "place of management" has been mentioned separately because it is not necessarily an "office". However, where the laws of the two Contracting States do not contain the concept of "a place of management" as distinct from an "office", there will be no need to refer to the former term in their bilateral convention.

(Renumbered on 23 July 1992; see HISTORY)

14. Subparagraph *f)* provides that mines, oil or gas wells, quarries or any other place of extraction of natural resources are permanent establishments. The term "any other place of extraction of natural resources" should be

interpreted broadly. It includes, for example, all places of extraction of hydrocarbons whether on or off-shore.

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(Renumbered on 23 July 1992; see HISTORY)

15. Subparagraph *f)* refers to the extraction of natural resources, but does not mention the exploration of such resources, whether on or off shore. Therefore, whenever income from such activities is considered to be business profits, the question whether these activities are carried on through a permanent establishment is governed by paragraph 1. Since, however, it has not been possible to arrive at a common view on the basic questions of the attribution of taxation rights and of the qualification of the income from exploration activities, the Contracting States may agree upon the insertion of specific provisions. They may agree, for instance, that an enterprise of a Contracting State, as regards its activities of exploration of natural resources in a place or area in the other Contracting State:

a) shall be deemed not to have a permanent establishment in that other State; or

b) shall be deemed to carry on such activities through a permanent establishment in that other State; or

c) shall be deemed to carry on such activities through a permanent establishment in that other State if such activities last longer than a specified period of time.

The Contracting States may moreover agree to submit the income from such activities to any other rule.

(Renumbered on 23 July 1992; see HISTORY)

Paragraph 3

16. The paragraph provides expressly that a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. Any of those items which does not meet this condition does not of itself constitute a permanent establishment, even if there is within it an installation, for instance an office or a workshop within the meaning of paragraph 2, associated with the construction activity. Where, however, such an office or workshop is used for a number of construction projects and the activities performed therein go beyond those mentioned in paragraph 4, it will be considered a permanent establishment if the conditions of the Article are otherwise met even if none of the projects involve a building site or construction or installation project that lasts more than twelve months. In that case, the situation of the workshop or office will therefore be different from that of these sites or projects, none of which will constitute a permanent establishment, and it will be important to ensure that only the profits properly

attributable to the functions performed through that office or workshop, taking into account the assets used and the risks assumed through that office or workshop, are attributed to the permanent establishment. This could include profits attributable to functions performed in relation to the various construction sites but only to the extent that these functions are properly attributable to the office.

(Amended on 22 July 2010; see HISTORY)

17. The term "building site or construction or installation project" includes not only the construction of buildings but also the construction of roads, bridges or canals, the renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals, the laying of pipe-lines and excavating and dredging. Additionally, the term "installation project" is not restricted to an installation related to a construction project; it also includes the installation of new equipment, such as a complex machine, in an existing building or outdoors. On-site planning and supervision of the erection of a building are covered by paragraph 3. States wishing to modify the text of the paragraph to provide expressly for that result are free to do so in their bilateral conventions.

(Amended on 28 January 2003; see HISTORY)

18. The twelve month test applies to each individual site or project. In determining how long the site or project has existed, no account should be taken of the time previously spent by the contractor concerned on other sites or projects which are totally unconnected with it. A building site should be regarded as a single unit, even if it is based on several contracts, provided that it forms a coherent whole commercially and geographically. Subject to this proviso, a building site forms a single unit even if the orders have been placed by several persons (*e.g.* for a row of houses). The twelve month threshold has given rise to abuses; it has sometimes been found that enterprises (mainly contractors or subcontractors working on the continental shelf or engaged in activities connected with the exploration and exploitation of the continental shelf) divided their contracts up into several parts, each covering a period less than twelve months and attributed to a different company which was, however, owned by the same group. Apart from the fact that such abuses may, depending on the circumstances, fall under the application of legislative or judicial anti-avoidance rules, countries concerned with this issue can adopt solutions in the framework of bilateral negotiations.

(Renumbered and amended on 23 July 1992; see HISTORY)

19. A site exists from the date on which the contractor begins his work, including any preparatory work, in the country where the construction is to be established, *e.g.* if he installs a planning office for the construction. In general,

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it continues to exist until the work is completed or permanently abandoned. A site should not be regarded as ceasing to exist when work is temporarily discontinued. Seasonal or other temporary interruptions should be included in determining the life of a site. Seasonal interruptions include interruptions due to bad weather. Temporary interruption could be caused, for example, by shortage of material or labour difficulties. Thus, for example, if a contractor started work on a road on 1 May, stopped on 1 November because of bad weather conditions or a lack of materials but resumed work on 1 February the following year, completing the road on 1 June, his construction project should be regarded as a permanent establishment because thirteen months elapsed between the date he first commenced work (1 May) and the date he finally finished (1 June of the following year). If an enterprise (general contractor) which has undertaken the performance of a comprehensive project subcontracts parts of such a project to other enterprises (subcontractors), the period spent by a subcontractor working on the building site must be considered as being time spent by the general contractor on the building project. The subcontractor himself has a permanent establishment at the site if his activities there last more than twelve months.

(Renumbered on 23 July 1992; see HISTORY)

19.1 In the case of fiscally transparent partnerships, the twelve month test is applied at the level of the partnership as concerns its own activities. If the period of time spent on the site by the partners and the employees of the partnership exceeds twelve months, the enterprise carried on by the partnership will therefore be considered to have a permanent establishment. Each partner will thus be considered to have a permanent establishment for purposes of the taxation of his share of the business profits derived by the partnership regardless of the time spent by himself on the site.

(Added on 29 April 2000; see HISTORY)

20. The very nature of a construction or installation project may be such that the contractor's activity has to be relocated continuously or at least from time to time, as the project progresses. This would be the case for instance where roads or canals were being constructed, waterways dredged, or pipe-lines laid. Similarly, where parts of a substantial structure such as an offshore platform are assembled at various locations within a country and moved to another location within the country for final assembly, this is part of a single project. In such cases, the fact that the work force is not present for twelve months in one particular location is immaterial. The activities performed at each particular spot are part of a single project, and that project must be regarded as a permanent establishment if, as a whole, it lasts more than twelve months.

(Amended on 28 January 2003; see HISTORY)

Paragraph 4

21. This paragraph lists a number of business activities which are treated as exceptions to the general definition laid down in paragraph 1 and which are not permanent establishments, even if the activity is carried on through a fixed place of business. The common feature of these activities is that they are, in general, preparatory or auxiliary activities. This is laid down explicitly in the case of the exception mentioned in subparagraph *e)*, which actually amounts to a general restriction of the scope of the definition contained in paragraph 1. Moreover subparagraph *f)* provides that combinations of activities mentioned in subparagraphs *a)* to *e)* in the same fixed place of business shall be deemed not to be a permanent establishment, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character. Thus the provisions of paragraph 4 are designed to prevent an enterprise of one State from being taxed in the other State, if it carries on in that other State, activities of a purely preparatory or auxiliary character.

(Renumbered on 23 July 1992; see HISTORY)

22. Subparagraph *a)* relates only to the case in which an enterprise acquires the use of facilities for storing, displaying or delivering its own goods or merchandise. Subparagraph *b)* relates to the stock of merchandise itself and provides that the stock, as such, shall not be treated as a permanent establishment if it is maintained for the purpose of storage, display or delivery. Subparagraph *c)* covers the case in which a stock of goods or merchandise belonging to one enterprise is processed by a second enterprise, on behalf of, or for the account of, the first-mentioned enterprise. The reference to the collection of information in subparagraph *d)* is intended to include the case of the newspaper bureau which has no purpose other than to act as one of many "tentacles" of the parent body; to exempt such a bureau is to do no more than to extend the concept of "mere purchase".

(Renumbered on 23 July 1992; see HISTORY)

23. Subparagraph *e)* provides that a fixed place of business through which the enterprise exercises solely an activity which has for the enterprise a preparatory or auxiliary character, is deemed not to be a permanent establishment. The wording of this subparagraph makes it unnecessary to produce an exhaustive list of exceptions. Furthermore, this subparagraph provides a generalised exception to the general definition in paragraph 1 and, when read with that paragraph, provides a more selective test, by which to determine what constitutes a permanent establishment. To a considerable degree it limits that definition and excludes from its rather wide scope a number of forms of business organisations which, although they are carried on through a fixed place of business, should not be treated as permanent

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establishments. It is recognised that such a place of business may well contribute to the productivity of the enterprise, but the services it performs are so remote from the actual realisation of profits that it is difficult to allocate any profit to the fixed place of business in question. Examples are fixed places of business solely for the purpose of advertising or for the supply of information or for scientific research or for the servicing of a patent or a know-how contract, if such activities have a preparatory or auxiliary character.

(Renumbered on 23 July 1992; see HISTORY)

24. It is often difficult to distinguish between activities which have a preparatory or auxiliary character and those which have not. The decisive criterion is whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the enterprise as a whole. Each individual case will have to be examined on its own merits. In any case, a fixed place of business whose general purpose is one which is identical to the general purpose of the whole enterprise, does not exercise a preparatory or auxiliary activity. Where, for example, the servicing of patents and know-how is the purpose of an enterprise, a fixed place of business of such enterprise exercising such an activity cannot get the benefits of subparagraph *e)*. A fixed place of business which has the function of managing an enterprise or even only a part of an enterprise or of a group of the concern cannot be regarded as doing a preparatory or auxiliary activity, for such a managerial activity exceeds this level. If enterprises with international ramifications establish a so-called "management office" in States in which they maintain subsidiaries, permanent establishments, agents or licensees, such office having supervisory and coordinating functions for all departments of the enterprise located within the region concerned, a permanent establishment will normally be deemed to exist, because the management office may be regarded as an office within the meaning of paragraph 2. Where a big international concern has delegated all management functions to its regional management offices so that the functions of the head office of the concern are restricted to general supervision (so-called polycentric enterprises), the regional management offices even have to be regarded as a "place of management" within the meaning of subparagraph *a)* of paragraph 2. The function of managing an enterprise, even if it only covers a certain area of the operations of the concern, constitutes an essential part of the business operations of the enterprise and therefore can in no way be regarded as an activity which has a preparatory or auxiliary character within the meaning of subparagraph *e)* of paragraph 4.

(Renumbered on 23 July 1992; see HISTORY)

25. A permanent establishment could also be constituted if an enterprise maintains a fixed place of business for the delivery of spare parts to customers

for machinery supplied to those customers where, in addition, it maintains or repairs such machinery, as this goes beyond the pure delivery mentioned in subparagraph *a)* of paragraph 4. Since these after-sale organisations perform an essential and significant part of the services of an enterprise vis-à-vis its customers, their activities are not merely auxiliary ones. Subparagraph *e)* applies only if the activity of the fixed place of business is limited to a preparatory or auxiliary one. This would not be the case where, for example, the fixed place of business does not only give information but also furnishes plans etc. specially developed for the purposes of the individual customer. Nor would it be the case if a research establishment were to concern itself with manufacture.

(Amended on 28 January 2003; see HISTORY)

26. Moreover, subparagraph *e)* makes it clear that the activities of the fixed place of business must be carried on for the enterprise. A fixed place of business which renders services not only to its enterprise but also directly to other enterprises, for example to other companies of a group to which the company owning the fixed place belongs, would not fall within the scope of subparagraph *e)*.

(Renumbered on 23 July 1992; see HISTORY)

26.1 Another example is that of facilities such as cables or pipelines that cross the territory of a country. Apart from the fact that income derived by the owner or operator of such facilities from their use by other enterprises is covered by Article 6 where they constitute immovable property under paragraph 2 of Article 6, the question may arise as to whether paragraph 4 applies to them. Where these facilities are used to transport property belonging to other enterprises, subparagraph *a)*, which is restricted to delivery of goods or merchandise belonging to the enterprise that uses the facility, will not be applicable as concerns the owner or operator of these facilities. Subparagraph *e)* also will not be applicable as concerns that enterprise since the cable or pipeline is not used solely for the enterprise and its use is not of preparatory or auxiliary character given the nature of the business of that enterprise. The situation is different, however, where an enterprise owns and operates a cable or pipeline that crosses the territory of a country solely for purposes of transporting its own property and such transport is merely incidental to the business of that enterprise, as in the case of an enterprise that is in the business of refining oil and that owns and operates a pipeline that crosses the territory of a country solely to transport its own oil to its refinery located in another country. In such case, subparagraph *a)* would be applicable. An additional question is whether the cable or pipeline could also constitute a permanent establishment for the customer of the operator of the cable or pipeline, *i.e.* the enterprise whose data, power or property is

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transmitted or transported from one place to another. In such a case, the enterprise is merely obtaining transmission or transportation services provided by the operator of the cable or pipeline and does not have the cable or pipeline at its disposal. As a consequence, the cable or pipeline cannot be considered to be a permanent establishment of that enterprise.

(Amended on 22 July 2010; see HISTORY)

27. As already mentioned in paragraph 21 above, paragraph 4 is designed to provide for exceptions to the general definition of paragraph 1 in respect of fixed places of business which are engaged in activities having a preparatory or auxiliary character. Therefore, according to subparagraph *f)* of paragraph 4, the fact that one fixed place of business combines any of the activities mentioned in subparagraphs *a)* to *e)* of paragraph 4 does not mean of itself that a permanent establishment exists. As long as the combined activity of such a fixed place of business is merely preparatory or auxiliary a permanent establishment should be deemed not to exist. Such combinations should not be viewed on rigid lines, but should be considered in the light of the particular circumstances. The criterion "preparatory or auxiliary character" is to be interpreted in the same way as is set out for the same criterion of subparagraph *e)* (see paragraphs 24 and 25 above). States which want to allow any combination of the items mentioned in subparagraphs *a)* to *e)*, disregarding whether or not the criterion of the preparatory or auxiliary character of such a combination is met, are free to do so by deleting the words "provided" to "character" in subparagraph *f)*.

(Amended on 28 January 2003; see HISTORY)

27.1 Subparagraph *f)* is of no importance in a case where an enterprise maintains several fixed places of business within the meaning of subparagraphs *a)* to *e)* provided that they are separated from each other locally and organisationally, as in such a case each place of business has to be viewed separately and in isolation for deciding whether a permanent establishment exists. Places of business are not "separated organisationally" where they each perform in a Contracting State complementary functions such as receiving and storing goods in one place, distributing those goods through another etc. An enterprise cannot fragment a cohesive operating business into several small operations in order to argue that each is merely engaged in a preparatory or auxiliary activity.

(Added on 28 January 2003; see HISTORY)

28. The fixed places of business mentioned in paragraph 4 cannot be deemed to constitute permanent establishments so long as their activities are restricted to the functions which are the prerequisite for assuming that the fixed place of business is not a permanent establishment. This will be the case

even if the contracts necessary for establishing and carrying on the business are concluded by those in charge of the places of business themselves. The employees of places of business within the meaning of paragraph 4 who are authorised to conclude such contracts should not be regarded as agents within the meaning of paragraph 5. A case in point would be a research institution the manager of which is authorised to conclude the contracts necessary for maintaining the institution and who exercises this authority within the framework of the functions of the institution. A permanent establishment, however, exists if the fixed place of business exercising any of the functions listed in paragraph 4 were to exercise them not only on behalf of the enterprise to which it belongs but also on behalf of other enterprises. If, for instance, an advertising agency maintained by an enterprise were also to engage in advertising for other enterprises, it would be regarded as a permanent establishment of the enterprise by which it is maintained.

(Renumbered on 23 July 1992; see HISTORY)

29. If a fixed place of business under paragraph 4 is deemed not to be a permanent establishment, this exception applies likewise to the disposal of movable property forming part of the business property of the place of business at the termination of the enterprise's activity in such installation (see paragraph 11 above and paragraph 2 of Article 13). Since, for example, the display of merchandise is excepted under subparagraphs *a)* and *b)*, the sale of the merchandise at the termination of a trade fair or convention is covered by this exception. The exception does not, of course, apply to sales of merchandise not actually displayed at the trade fair or convention.

(Renumbered and amended on 23 July 1992; see HISTORY)

30. A fixed place of business used both for activities which rank as exceptions (paragraph 4) and for other activities would be regarded as a single permanent establishment and taxable as regards both types of activities. This would be the case, for instance, where a store maintained for the delivery of goods also engaged in sales.

(Renumbered on 23 July 1992; see HISTORY)

Paragraph 5

31. It is a generally accepted principle that an enterprise should be treated as having a permanent establishment in a State if there is under certain conditions a person acting for it, even though the enterprise may not have a fixed place of business in that State within the meaning of paragraphs 1 and 2. This provision intends to give that State the right to tax in such cases. Thus paragraph 5 stipulates the conditions under which an enterprise is deemed to have a permanent establishment in respect of any activity of a person acting

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for it. The paragraph was redrafted in the 1977 Model Convention to clarify the intention of the corresponding provision of the 1963 Draft Convention without altering its substance apart from an extension of the excepted activities of the person.

(Renumbered and amended on 23 July 1992; see HISTORY)

32. Persons whose activities may create a permanent establishment for the enterprise are so-called dependent agents *i.e.* persons, whether or not employees of the enterprise, who are not independent agents falling under paragraph 6. Such persons may be either individuals or companies and need not be residents of, nor have a place of business in, the State in which they act for the enterprise. It would not have been in the interest of international economic relations to provide that the maintenance of any dependent person would lead to a permanent establishment for the enterprise. Such treatment is to be limited to persons who in view of the scope of their authority or the nature of their activity involve the enterprise to a particular extent in business activities in the State concerned. Therefore, paragraph 5 proceeds on the basis that only persons having the authority to conclude contracts can lead to a permanent establishment for the enterprise maintaining them. In such a case the person has sufficient authority to bind the enterprise's participation in the business activity in the State concerned. The use of the term "permanent establishment" in this context presupposes, of course, that that person makes use of this authority repeatedly and not merely in isolated cases.

(Amended on 28 January 2003; see HISTORY)

32.1 Also, the phrase "authority to conclude contracts in the name of the enterprise" does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise. Lack of active involvement by an enterprise in transactions may be indicative of a grant of authority to an agent. For example, an agent may be considered to possess actual authority to conclude contracts where he solicits and receives (but does not formally finalise) orders which are sent directly to a warehouse from which goods are delivered and where the foreign enterprise routinely approves the transactions.

(Added on 28 January 2003; see HISTORY)

33. The authority to conclude contracts must cover contracts relating to operations which constitute the business proper of the enterprise. It would be irrelevant, for instance, if the person had authority to engage employees for the enterprise to assist that person's activity for the enterprise or if the person were authorised to conclude, in the name of the enterprise, similar contracts

relating to internal operations only. Moreover the authority has to be habitually exercised in the other State; whether or not this is the case should be determined on the basis of the commercial realities of the situation. A person who is authorised to negotiate all elements and details of a contract in a way binding on the enterprise can be said to exercise this authority "in that State", even if the contract is signed by another person in the State in which the enterprise is situated or if the first person has not formally been given a power of representation. The mere fact, however, that a person has attended or even participated in negotiations in a State between an enterprise and a client will not be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise. The fact that a person has attended or even participated in such negotiations could, however, be a relevant factor in determining the exact functions performed by that person on behalf of the enterprise. Since, by virtue of paragraph 4, the maintenance of a fixed place of business solely for purposes listed in that paragraph is deemed not to constitute a permanent establishment, a person whose activities are restricted to such purposes does not create a permanent establishment either.

(Amended on 15 July 2005; see HISTORY)

33.1 The requirement that an agent must "habitually" exercise an authority to conclude contracts reflects the underlying principle in Article 5 that the presence which an enterprise maintains in a Contracting State should be more than merely transitory if the enterprise is to be regarded as maintaining a permanent establishment, and thus a taxable presence, in that State. The extent and frequency of activity necessary to conclude that the agent is "habitually exercising" contracting authority will depend on the nature of the contracts and the business of the principal. It is not possible to lay down a precise frequency test. Nonetheless, the same sorts of factors considered in paragraph 6 would be relevant in making that determination.

(Added on 28 January 2003; see HISTORY)

34. Where the requirements set out in paragraph 5 are met, a permanent establishment of the enterprise exists to the extent that the person acts for the latter, *i.e.* not only to the extent that such a person exercises the authority to conclude contracts in the name of the enterprise.

(Renumbered on 23 July 1992; see HISTORY)

35. Under paragraph 5, only those persons who meet the specific conditions may create a permanent establishment; all other persons are excluded. It should be borne in mind, however, that paragraph 5 simply provides an alternative test of whether an enterprise has a permanent establishment in a State. If it can be shown that the enterprise has a permanent establishment

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within the meaning of paragraphs 1 and 2 (subject to the provisions of paragraph 4), it is not necessary to show that the person in charge is one who would fall under paragraph 5.

(Renumbered on 23 July 1992; see HISTORY)

Paragraph 6

36. Where an enterprise of a Contracting State carries on business dealings through a broker, general commission agent or any other agent of an independent status, it cannot be taxed in the other Contracting State in respect of those dealings if the agent is acting in the ordinary course of his business (see paragraph 32 above). Although it stands to reason that such an agent, representing a separate enterprise, cannot constitute a permanent establishment of the foreign enterprise, paragraph 6 has been inserted in the Article for the sake of clarity and emphasis.

(Renumbered and amended on 23 July 1992; see HISTORY)

37. A person will come within the scope of paragraph 6, *i.e.* he will not constitute a permanent establishment of the enterprise on whose behalf he acts only if:

a) he is independent of the enterprise both legally and economically, and

b) he acts in the ordinary course of his business when acting on behalf of the enterprise.

(Renumbered and amended on 23 July 1992; see HISTORY)

38. Whether a person is independent of the enterprise represented depends on the extent of the obligations which this person has vis-à-vis the enterprise. Where the person's commercial activities for the enterprise are subject to detailed instructions or to comprehensive control by it, such person cannot be regarded as independent of the enterprise. Another important criterion will be whether the entrepreneurial risk has to be borne by the person or by the enterprise the person represents.

(Amended on 28 January 2003; see HISTORY)

38.1 In relation to the test of legal dependence, it should be noted that the control which a parent company exercises over its subsidiary in its capacity as shareholder is not relevant in a consideration of the dependence or otherwise of the subsidiary in its capacity as an agent for the parent. This is consistent with the rule in paragraph 7 of Article 5. But, as paragraph 41 of the Commentary indicates, the subsidiary may be considered a dependent agent of its parent by application of the same tests which are applied to unrelated companies.

(Added on 28 January 2003; see HISTORY)

38.2 The following considerations should be borne in mind when determining whether an agent may be considered to be independent.

(Added on 28 January 2003; see HISTORY)

38.3 An independent agent will typically be responsible to his principal for the results of his work but not subject to significant control with respect to the manner in which that work is carried out. He will not be subject to detailed instructions from the principal as to the conduct of the work. The fact that the principal is relying on the special skill and knowledge of the agent is an indication of independence.

(Added on 28 January 2003; see HISTORY)

38.4 Limitations on the scale of business which may be conducted by the agent clearly affect the scope of the agent's authority. However such limitations are not relevant to dependency which is determined by consideration of the extent to which the agent exercises freedom in the conduct of business on behalf of the principal within the scope of the authority conferred by the agreement.

(Added on 28 January 2003; see HISTORY)

38.5 It may be a feature of the operation of an agreement that an agent will provide substantial information to a principal in connection with the business conducted under the agreement. This is not in itself a sufficient criterion for determination that the agent is dependent unless the information is provided in the course of seeking approval from the principal for the manner in which the business is to be conducted. The provision of information which is simply intended to ensure the smooth running of the agreement and continued good relations with the principal is not a sign of dependence.

(Added on 28 January 2003; see HISTORY)

38.6 Another factor to be considered in determining independent status is the number of principals represented by the agent. Independent status is less likely if the activities of the agent are performed wholly or almost wholly on behalf of only one enterprise over the lifetime of the business or a long period of time. However, this fact is not by itself determinative. All the facts and circumstances must be taken into account to determine whether the agent's activities constitute an autonomous business conducted by him in which he bears risk and receives reward through the use of his entrepreneurial skills and knowledge. Where an agent acts for a number of principals in the ordinary course of his business and none of these is predominant in terms of the business carried on by the agent legal dependence may exist if the

principals act in concert to control the acts of the agent in the course of his business on their behalf.

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(Added on 28 January 2003; see HISTORY)

38.7 Persons cannot be said to act in the ordinary course of their own business if, in place of the enterprise, such persons perform activities which, economically, belong to the sphere of the enterprise rather than to that of their own business operations. Where, for example, a commission agent not only sells the goods or merchandise of the enterprise in his own name but also habitually acts, in relation to that enterprise, as a permanent agent having an authority to conclude contracts, he would be deemed in respect of this particular activity to be a permanent establishment, since he is thus acting outside the ordinary course of his own trade or business (namely that of a commission agent), unless his activities are limited to those mentioned at the end of paragraph 5.

(Added on 28 January 2003; see HISTORY)

38.8 In deciding whether or not particular activities fall within or outside the ordinary course of business of an agent, one would examine the business activities customarily carried out within the agent's trade as a broker, commission agent or other independent agent rather than the other business activities carried out by that agent. Whilst the comparison normally should be made with the activities customary to the agent's trade, other complementary tests may in certain circumstances be used concurrently or alternatively, for example where the agent's activities do not relate to a common trade.

(Added on 28 January 2003; see HISTORY)

39. According to the definition of the term "permanent establishment" an insurance company of one State may be taxed in the other State on its insurance business, if it has a fixed place of business within the meaning of paragraph 1 or if it carries on business through a person within the meaning of paragraph 5. Since agencies of foreign insurance companies sometimes do not meet either of the above requirements, it is conceivable that these companies do large-scale business in a State without being taxed in that State on their profits arising from such business. In order to obviate this possibility, various conventions concluded by OECD member countries include a provision which stipulates that insurance companies of a State are deemed to have a permanent establishment in the other State if they collect premiums in that other State through an agent established there — other than an agent who already constitutes a permanent establishment by virtue of paragraph 5 — or insure risks situated in that territory through such an agent. The decision as to whether or not a provision along these lines should be included in a convention will depend on the factual and legal situation prevailing in the

Contracting States concerned. Frequently, therefore, such a provision will not be contemplated. In view of this fact, it did not seem advisable to insert a provision along these lines in the Model Convention.

(Renumbered on 23 July 1992; see HISTORY)

Paragraph 7

40. It is generally accepted that the existence of a subsidiary company does not, of itself, constitute that subsidiary company a permanent establishment of its parent company. This follows from the principle that, for the purpose of taxation, such a subsidiary company constitutes an independent legal entity. Even the fact that the trade or business carried on by the subsidiary company is managed by the parent company does not constitute the subsidiary company a permanent establishment of the parent company.

(Renumbered on 23 July 1992; see HISTORY)

41. A parent company may, however, be found, under the rules of paragraph 1 or 5 of the Article, to have a permanent establishment in a State where a subsidiary has a place of business. Thus, any space or premises belonging to the subsidiary that is at the disposal of the parent company (see paragraphs 4, 5 and 6 above) and that constitutes a fixed place of business through which the parent carries on its own business will constitute a permanent establishment of the parent under paragraph 1, subject to paragraphs 3 and 4 of the Article (see for instance, the example in paragraph 4.3 above). Also, under paragraph 5, a parent will be deemed to have a permanent establishment in a State in respect of any activities that its subsidiary undertakes for it if the subsidiary has, and habitually exercises, in that State an authority to conclude contracts in the name of the parent (see paragraphs 32, 33 and 34 above), unless these activities are limited to those referred to in paragraph 4 of the Article or unless the subsidiary acts in the ordinary course of its business as an independent agent to which paragraph 6 of the Article applies.

(Amended on 15 July 2005; see HISTORY)

41.1 The same principles apply to any company forming part of a multinational group so that such a company may be found to have a permanent establishment in a State where it has at its disposal (see paragraphs 4, 5 and 6 above) and uses premises belonging to another company of the group, or if the former company is deemed to have a permanent establishment under paragraph 5 of the Article (see paragraphs 32, 33 and 34 above). The determination of the existence of a permanent establishment under the rules of paragraph 1 or 5 of the Article must, however, be done separately for each company of the group. Thus, the existence in one State of

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a permanent establishment of one company of the group will not have any relevance as to whether another company of the group has itself a permanent establishment in that State.

(Added on 15 July 2005; see HISTORY)

42. Whilst premises belonging to a company that is a member of a multinational group can be put at the disposal of another company of the group and may, subject to the other conditions of Article 5, constitute a permanent establishment of that other company if the business of that other company is carried on through that place, it is important to distinguish that case from the frequent situation where a company that is a member of a multinational group provides services (*e.g.* management services) to another company of the group as part of its own business carried on in premises that are not those of that other company and using its own personnel. In that case, the place where those services are provided is not at the disposal of the latter company and it is not the business of that company that is carried on through that place. That place cannot, therefore, be considered to be a permanent establishment of the company to which the services are provided. Indeed, the fact that a company's own activities at a given location may provide an economic benefit to the business of another company does not mean that the latter company carries on its business through that location: clearly, a company that merely purchases parts produced or services supplied by another company in a different country would not have a permanent establishment because of that, even though it may benefit from the manufacturing of these parts or the supplying of these services.

(Replaced on 15 July 2005; see HISTORY)

Electronic commerce

42.1 There has been some discussion as to whether the mere use in electronic commerce operations of computer equipment in a country could constitute a permanent establishment. That question raises a number of issues in relation to the provisions of the Article.

(Added on 28 January 2003; see HISTORY)

42.2 Whilst a location where automated equipment is operated by an enterprise may constitute a permanent establishment in the country where it is situated (see below), a distinction needs to be made between computer equipment, which may be set up at a location so as to constitute a permanent establishment under certain circumstances, and the data and software which is used by, or stored on, that equipment. For instance, an Internet web site, which is a combination of software and electronic data, does not in itself constitute tangible property. It therefore does not have a location that can

constitute a "place of business" as there is no "facility such as premises or, in certain instances, machinery or equipment" (see paragraph 2 above) as far as the software and data constituting that web site is concerned. On the other hand, the server on which the web site is stored and through which it is accessible is a piece of equipment having a physical location and such location may thus constitute a "fixed place of business" of the enterprise that operates that server.

(Added on 28 January 2003; see HISTORY)

42.3 The distinction between a web site and the server on which the web site is stored and used is important since the enterprise that operates the server may be different from the enterprise that carries on business through the web site. For example, it is common for the web site through which an enterprise carries on its business to be hosted on the server of an Internet Service Provider (ISP). Although the fees paid to the ISP under such arrangements may be based on the amount of disk space used to store the software and data required by the web site, these contracts typically do not result in the server and its location being at the disposal of the enterprise (see paragraph 4 above), even if the enterprise has been able to determine that its web site should be hosted on a particular server at a particular location. In such a case, the enterprise does not even have a physical presence at that location since the web site is not tangible. In these cases, the enterprise cannot be considered to have acquired a place of business by virtue of that hosting arrangement. However, if the enterprise carrying on business through a web site has the server at its own disposal, for example it owns (or leases) and operates the server on which the web site is stored and used, the place where that server is located could constitute a permanent establishment of the enterprise if the other requirements of the Article are met.

(Added on 28 January 2003; see HISTORY)

42.4 Computer equipment at a given location may only constitute a permanent establishment if it meets the requirement of being fixed. In the case of a server, what is relevant is not the possibility of the server being moved, but whether it is in fact moved. In order to constitute a fixed place of business, a server will need to be located at a certain place for a sufficient period of time so as to become fixed within the meaning of paragraph 1.

(Added on 28 January 2003; see HISTORY)

42.5 Another issue is whether the business of an enterprise may be said to be wholly or partly carried on at a location where the enterprise has equipment such as a server at its disposal. The question of whether the business of an enterprise is wholly or partly carried on through such equipment needs to be examined on a case-by-case basis, having regard to whether it can be said

that, because of such equipment, the enterprise has facilities at its disposal where business functions of the enterprise are performed.

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(Added on 28 January 2003; see HISTORY)

42.6 Where an enterprise operates computer equipment at a particular location, a permanent establishment may exist even though no personnel of that enterprise is required at that location for the operation of the equipment. The presence of personnel is not necessary to consider that an enterprise wholly or partly carries on its business at a location when no personnel are in fact required to carry on business activities at that location. This conclusion applies to electronic commerce to the same extent that it applies with respect to other activities in which equipment operates automatically, *e.g.* automatic pumping equipment used in the exploitation of natural resources.

(Added on 28 January 2003; see HISTORY)

42.7 Another issue relates to the fact that no permanent establishment may be considered to exist where the electronic commerce operations carried on through computer equipment at a given location in a country are restricted to the preparatory or auxiliary activities covered by paragraph 4. The question of whether particular activities performed at such a location fall within paragraph 4 needs to be examined on a case-by-case basis having regard to the various functions performed by the enterprise through that equipment. Examples of activities which would generally be regarded as preparatory or auxiliary include:

— providing a communications link — much like a telephone line — between suppliers and customers;

— advertising of goods or services;

— relaying information through a mirror server for security and efficiency purposes;

— gathering market data for the enterprise;

— supplying information.

(Added on 28 January 2003; see HISTORY)

42.8 Where, however, such functions form in themselves an essential and significant part of the business activity of the enterprise as a whole, or where other core functions of the enterprise are carried on through the computer equipment, these would go beyond the activities covered by paragraph 4 and if the equipment constituted a fixed place of business of the enterprise (as discussed in paragraphs 42.2 to 42.6 above), there would be a permanent establishment.

(Added on 28 January 2003; see HISTORY)

42.9 What constitutes core functions for a particular enterprise clearly depends on the nature of the business carried on by that enterprise. For instance, some ISPs are in the business of operating their own servers for the purpose of hosting web sites or other applications for other enterprises. For these ISPs, the operation of their servers in order to provide services to customers is an essential part of their commercial activity and cannot be considered preparatory or auxiliary. A different example is that of an enterprise (sometimes referred to as an "e-tailer") that carries on the business of selling products through the Internet. In that case, the enterprise is not in the business of operating servers and the mere fact that it may do so at a given location is not enough to conclude that activities performed at that location are more than preparatory and auxiliary. What needs to be done in such a case is to examine the nature of the activities performed at that location in light of the business carried on by the enterprise. If these activities are merely preparatory or auxiliary to the business of selling products on the Internet (for example, the location is used to operate a server that hosts a web site which, as is often the case, is used exclusively for advertising, displaying a catalogue of products or providing information to potential customers), paragraph 4 will apply and the location will not constitute a permanent establishment. If, however, the typical functions related to a sale are performed at that location (for example, the conclusion of the contract with the customer, the processing of the payment and the delivery of the products are performed automatically through the equipment located there), these activities cannot be considered to be merely preparatory or auxiliary.

(Added on 28 January 2003; see HISTORY)

42.10 A last issue is whether paragraph 5 may apply to deem an ISP to constitute a permanent establishment. As already noted, it is common for ISPs to provide the service of hosting the web sites of other enterprises on their own servers. The issue may then arise as to whether paragraph 5 may apply to deem such ISPs to constitute permanent establishments of the enterprises that carry on electronic commerce through web sites operated through the servers owned and operated by these ISPs. Whilst this could be the case in very unusual circumstances, paragraph 5 will generally not be applicable because the ISPs will not constitute an agent of the enterprises to which the web sites belong, because they will not have authority to conclude contracts in the name of these enterprises and will not regularly conclude such contracts or because they will constitute independent agents acting in the ordinary course of their business, as evidenced by the fact that they host the web sites of many different enterprises. It is also clear that since the web site through which an enterprise carries on its business is not itself a "person" as defined in Article 3, paragraph 5 cannot apply to deem a permanent establishment to

exist by virtue of the web site being an agent of the enterprise for purposes of that paragraph.

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(Added on 28 January 2003; see HISTORY)

The taxation of services

42.11 The combined effect of this Article and Article 7 is that the profits from services performed in the territory of a Contracting State by an enterprise of the other Contracting State are not taxable in the first-mentioned State if they are not attributable to a permanent establishment situated therein (as long as they are not covered by other Articles of the Convention that would allow such taxation). This result, under which these profits are only taxable in the other State, is supported by various policy and administrative considerations. It is consistent with the principle of Article 7 that until an enterprise of one State sets up a permanent establishment in another State, it should not be regarded as participating in the economic life of that State to such an extent that it comes within the taxing jurisdiction of that other State. Also, the provision of services should, as a general rule subject to a few exceptions for some types of service (*e.g.* those covered by Articles 8 and 17), be treated the same way as other business activities and, therefore, the same permanent establishment threshold of taxation should apply to all business activities, including the provision of independent services.

(Added on 17 July 2008; see HISTORY)

42.12 One of the administrative considerations referred to above is that the extension of the cases where source taxation of profits from services performed in the territory of a Contracting State by an enterprise of the other Contracting State would be allowed would increase the compliance and administrative burden of enterprises and tax administrations. This would be especially problematic with respect to services provided to non-business consumers, which would not need to be disclosed to the source country's tax administration for purposes of claiming a business expense deduction. Since the rules that have typically been designed for that purpose are based on the amount of time spent in a State, both tax administrations and enterprises would need to take account of the time spent in a country by personnel of service enterprises and these enterprises would face the risk of having a permanent establishment in unexpected circumstances in cases where they would be unable to determine in advance how long personnel would be present in a particular country (*e.g.* in situations where that presence would be extended because of unforeseen difficulties or at the request of a client). These cases create particular compliance difficulties as they require an enterprise to retroactively comply with a number of administrative requirements associated with a permanent establishment. These concerns

relate to the need to maintain books and records, the taxation of the employees (*e.g.* the need to make source deductions in another country) as well as other non-income tax requirements.

(Added on 17 July 2008; see HISTORY)

42.13 Also, the source taxation of profits from services performed in the territory of a Contracting State by an enterprise of the other Contracting State that does not have a fixed place of business in the first-mentioned State would create difficulties concerning the determination of the profits to be taxed and the collection of the relevant tax. In most cases, the enterprise would not have the accounting records and assets typically associated with a permanent establishment and there would be no dependent agent which could comply with information and collection requirements. Moreover, whilst it is a common feature of States' domestic law to tax profits from services performed in their territory, it does not necessarily represent optimal tax treaty policy.

(Added on 17 July 2008; see HISTORY)

42.14 Some States, however, are reluctant to adopt the principle of exclusive residence taxation of services that are not attributable to a permanent establishment situated in their territory but that are performed in that territory. These States propose changes to the Article in order to preserve source taxation rights, in certain circumstances, with respect to the profits from such services. States that believe that additional source taxation rights should be allocated under a treaty with respect to services performed in their territory rely on various arguments to support their position.

(Added on 17 July 2008; see HISTORY)

42.15 These States may consider that profits from services performed in a given state should be taxable in that state on the basis of the generally-accepted policy principles for determining when business profits should be considered to have their source within a jurisdiction. They consider that, from the exclusive angle of the pure policy question of where business profits originate, the State where services are performed should have a right to tax even when these services are not attributable to a permanent establishment as defined in Article 5. They would note that the domestic law of many countries provides for the taxation of services performed in these countries even in the absence of a permanent establishment (even though services performed over very short periods of time may not always be taxed in practice).

(Added on 17 July 2008; see HISTORY)

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42.16 These States are concerned that some service businesses do not require a fixed place of business in their territory in order to carry on a substantial level of business activities therein and consider that these additional rights are therefore appropriate.

(Added on 17 July 2008; see HISTORY)

42.17 Also, these States consider that even if the taxation of profits of enterprises carried on by non-residents that are not attributable to a permanent establishment raises certain compliance and administrative difficulties, these difficulties do not justify exempting from tax the profits from all services performed on their territory by such enterprises. Those who support that view may refer to mechanisms that are already in place in some States to ensure taxation of services performed in these States but not attributable to permanent establishments (such mechanisms are based on requirements for resident payers to report, and possibly withhold tax on, payments to non-residents for services performed in these States).

(Added on 17 July 2008; see HISTORY)

42.18 It should be noted, however, that all member States agree that a State should not have source taxation rights on income derived from the provision of services performed by a non-resident outside that State. Under tax conventions, the profits from the sale of goods that are merely imported by a resident of a country and that are neither produced nor distributed through a permanent establishment in that country are not taxable therein and the same principle should apply in the case of services. The mere fact that the payer of the consideration for services is a resident of a State, or that such consideration is borne by a permanent establishment situated in that State or that the result of the services is used within the State does not constitute a sufficient nexus to warrant allocation of income taxing rights to that State.

(Added on 17 July 2008; see HISTORY)

42.19 Another fundamental issue on which there is general agreement relates to the determination of the amount on which tax should be levied. In the case of non-employment services (and subject to possible exceptions such as Article 17) only the profits derived from the services should be taxed. Thus, provisions that are sometimes included in bilateral conventions and that allow a State to tax the gross amount of the fees paid for certain services if the payer of the fees is a resident of that State do not seem to provide an appropriate way of taxing services. First, because these provisions are not restricted to services performed in the State of source, they have the effect of allowing a State to tax business activities that do not take place in that State.

Second, these rules allow taxation of the gross payments for services as opposed to the profits therefrom.

(Added on 17 July 2008; see HISTORY)

42.20 Also, member States agree that it is appropriate, for compliance and other reasons, not to allow a State to tax the profits from services performed in their territory in certain circumstances (*e.g.* when such services are provided during a very short period of time).

(Added on 17 July 2008; see HISTORY)

42.21 The Committee therefore considered that it was important to circumscribe the circumstances in which States that did not agree with the conclusion in paragraph 42.11 above could, if they wished to, provide that profits from services performed in the territory of a Contracting State by an enterprise of the other Contracting State would be taxable by that State even if there was no permanent establishment, as defined in Article 5, to which the profits were attributable.

(Added on 17 July 2008; see HISTORY)

42.22 Clearly, such taxation should not extend to services performed outside the territory of a State and should apply only to the profits from these services rather than to the payments for them. Also, there should be a minimum level of presence in a State before such taxation is allowed.

(Added on 17 July 2008; see HISTORY)

42.23 The following is an example of a provision that would conform to these requirements; States are free to agree bilaterally to include such a provision in their tax treaties:

> Notwithstanding the provisions of paragraphs 1, 2 and 3, where an enterprise of a Contracting State performs services in the other Contracting State
>
> *a)* through an individual who is present in that other State for a period or periods exceeding in the aggregate 183 days in any twelve month period, and more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other State through that individual, or
>
> *b)* for a period or periods exceeding in the aggregate 183 days in any twelve month period, and these services are performed for the same project or for connected projects through one or more individuals who are present and performing such services in that other State

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the activities carried on in that other State in performing these services shall be deemed to be carried on through a permanent establishment of the enterprise situated in that other State, unless these services are limited to those mentioned in paragraph 4 which, if performed through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph. For the purposes of this paragraph, services performed by an individual on behalf of one enterprise shall not be considered to be performed by another enterprise through that individual unless that other enterprise supervises, directs or controls the manner in which these services are performed by the individual.

(Added on 17 July 2008; see HISTORY)

42.24 That alternative provision constitutes an extension of the permanent establishment definition that allows taxation of income from services provided by enterprises carried on by non-residents but does so in conformity with the principles described in paragraph 42.22. The following paragraphs discuss various aspects of the alternative provision; clearly these paragraphs are not relevant in the case of treaties that do not include such a provision and do not, therefore, allow a permanent establishment to be found merely because the conditions described in this provision have been met.

(Added on 17 July 2008; see HISTORY)

42.25 The provision has the effect of deeming a permanent establishment to exist where one would not otherwise exist under the definition provided in paragraph 1 and the examples of paragraph 2. It therefore applies notwithstanding these paragraphs. As is the case of paragraph 5 of the Article, the provision provides a supplementary basis under which an enterprise may be found to have a permanent establishment in a State; it could apply, for example, where a consultant provides services over a long period in a country but at different locations that do not meet the conditions of paragraph 1 to constitute one or more permanent establishments. If it can be shown that the enterprise has a permanent establishment within the meaning of paragraphs 1 and 2 (subject to the provisions of paragraph 4), it is not necessary to apply the provision in order to find a permanent establishment. Since the provision simply creates a permanent establishment when none would otherwise exist, it does not provide an alternative definition of the concept of permanent establishment and obviously cannot limit the scope of the definition in paragraph 1 and of the examples in paragraph 2.

(Added on 17 July 2008; see HISTORY)

42.26 The provision also applies notwithstanding paragraph 3. Thus, an enterprise may be deemed to have a permanent establishment because it

performs services in a country for the periods of time provided for in the suggested paragraph even if the various locations where these services are performed do not constitute permanent establishments pursuant to paragraph 3. The following example illustrates that result. A self-employed individual resident of one Contracting State provides services and is present in the other Contracting State for more than 183 days during a twelve month period but his services are performed for equal periods of time at a location that is not a construction site (and are not in relation to a construction or installation project) as well as on two unrelated building sites which each lasts less than the period of time provided for in paragraph 3. Whilst paragraph 3 would deem the two sites not to constitute permanent establishments, the proposed paragraph, which applies notwithstanding paragraph 3, would deem the enterprise carried on by that person to have a permanent establishment (since the individual is self-employed, it must be assumed that the 50 per cent of gross revenues test will be met with respect to his enterprise).

(Added on 17 July 2008; see HISTORY)

42.27 Another example is that of a large construction enterprise that carries on a single construction project in a country. If the project is carried on at a single site, the provision should not have a significant impact as long as the period required for the site to constitute a permanent establishment is not substantially different from the period required for the provision to apply. States that wish to use the alternative provision may therefore wish to consider referring to the same periods of time in that provision and in paragraph 3 of Article 5; if a shorter period is used in the alternative provision, this will reduce, in practice, the scope of application of paragraph 3.

(Added on 17 July 2008; see HISTORY)

42.28 The situation, however, may be different if the project, or connected projects, are carried out in different parts of a country. If the individual sites where a single project is carried on do not last sufficiently long for each of them to constitute a permanent establishment (see, however, paragraph 20 above), a permanent establishment will still be deemed to exist if the conditions of the alternative provision are met. That result is consistent with the purpose of the provision, which is to subject to source taxation foreign enterprises that are present in a country for a sufficiently long period of time notwithstanding the fact that their presence at any particular location in that country is not sufficiently long to make that location a fixed place of business of the enterprise. Some States, however, may consider that paragraph 3 should prevail over the alternative provision and may wish to amend the provision accordingly.

(Added on 17 July 2008; see HISTORY)

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42.29 The suggested paragraph only applies to services. Other types of activities that do not constitute services are therefore excluded from its scope. Thus, for instance, the paragraph would not apply to a foreign enterprise that carries on fishing activities in the territorial waters of a State and derives revenues from selling its catches (in some treaties, however, activities such as fishing and oil extraction may be covered by specific provisions).

(Added on 17 July 2008; see HISTORY)

42.30 The provision applies to services performed by an enterprise. Thus, services must be provided by the enterprise to third parties. Clearly, the provision could not have the effect of deeming an enterprise to have a permanent establishment merely because services are provided to that enterprise. For example, services might be provided by an individual to his employer without that employer performing any services (*e.g.* an employee who provides manufacturing services to an enterprise that sells manufactured products). Another example would be where the employees of one enterprise provide services in one country to an associated enterprise under detailed instructions and close supervision of the latter enterprise; in that case, assuming the services in question are not for the benefit of any third party, the latter enterprise does not itself perform any services to which the provision could apply.

(Added on 17 July 2008; see HISTORY)

42.31 Also, the provision only applies to services that are performed in a State by a foreign enterprise. Whether or not the relevant services are furnished to a resident of the State does not matter; what matters is that the services are performed in the State through an individual present in that State.

(Added on 17 July 2008; see HISTORY)

42.32 The alternative provision does not specify that the services must be provided "through employees or other personnel engaged by the enterprise", a phrase that is sometimes found in bilateral treaties. It simply provides that the services must be performed by an enterprise. As explained in paragraph 10, the business of an enterprise (which, in the context of the paragraph, would include the services performed in a Contracting State) "is carried on mainly by the entrepreneur or persons who are in paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (*e.g.* dependent agents)." For the purposes of the alternative provision, the individuals through which an enterprise provides services will therefore be the individuals referred to in paragraph 10, subject to the exception included in the last sentence of that provision (see paragraph 42.43 below).

(Added on 17 July 2008; see HISTORY)

42.33 The alternative provision will apply in two different sets of circumstances. Subparagraph *a)* looks at the duration of the presence of the individual through whom an enterprise derives most of its revenues in a way that is similar to that of subparagraph 2 *a)* of Article 15; subparagraph *b)* looks at the duration of the activities of the individuals through whom the services are performed.

(Added on 17 July 2008; see HISTORY)

42.34 Subparagraph *a)* deals primarily with the situation of an enterprise carried on by a single individual. It also covers, however, the case of an enterprise which, during the relevant period or periods, derives most of its revenues from services provided by one individual. Such extension is necessary to avoid a different treatment between, for example, a case where services are provided by an individual and a case where similar services are provided by a company all the shares of which are owned by the only employee of that company.

(Added on 17 July 2008; see HISTORY)

42.35 The subparagraph may apply in different situations where an enterprise performs services through an individual, such as when the services are performed by a sole proprietorship, by the partner of a partnership, by the employee of a company etc. The main conditions are that

— the individual through whom the services are performed be present in a State for a period or periods exceeding in the aggregate 183 days in any twelve month period, and

— more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during the period or periods of presence be derived from the services performed in that State through that individual.

(Added on 17 July 2008; see HISTORY)

42.36 The first condition refers to the days of presence of an individual. Since the formulation is identical to that of subparagraph 2 *a)* of Article 15, the principles applicable to the computation of the days of presence for purposes of that last subparagraph are also applicable to the computation of the days of presence for the purpose of the suggested paragraph.

(Added on 17 July 2008; see HISTORY)

42.37 For the purposes of the second condition, according to which more than 50 per cent of the gross revenues attributable to active business activities of the enterprise during the relevant period or periods must be derived from the services performed in that State through that individual, the gross revenues attributable to active business activities of the enterprise would represent

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what the enterprise has charged or should charge for its active business activities, regardless of when the actual billing will occur or of domestic law rules concerning when such revenues should be taken into account for tax purposes. Such active business activities are not restricted to activities related to the provision of services. Gross revenues attributable to "active business activities" would clearly exclude income from passive investment activities, including, for example, receiving interest and dividends from investing surplus funds. States may, however, prefer to use a different test, such as "50 per cent of the business profits of the enterprise during this period or periods is derived from the services" or "the services represent the most important part of the business activities of the enterprise", in order to identify an enterprise that derives most of its revenues from services performed by an individual on their territory.

(Added on 17 July 2008; see HISTORY)

42.38 The following examples illustrate the application of subparagraph *a)* (assuming that the alternative provision has been included in a treaty between States R and S):

— Example 1: W, a resident of State R, is a consultant who carries on her business activities in her own name (*i.e.* that enterprise is a sole proprietorship). Between 2 February 00 and 1 February 01, she is present in State S for a period or periods of 190 days and during that period all the revenues from her business activities are derived from services that she performs in State S. Since subparagraph *a)* applies in that situation, these services shall be deemed to be performed through a permanent establishment in State S.

— Example 2: X, a resident of State R, is one of the two shareholders and employees of XCO, a company resident of State R that provides engineering services. Between 20 December 00 and 19 December 01, X is present in State S for a period or periods of 190 days and during that period, 70 per cent of all the gross revenues of XCO attributable to active business activities are derived from the services that X performs in State S. Since subparagraph *a)* applies in that situation, these services shall be deemed to be performed through a permanent establishment of XCO in State S.

— Example 3: X and Y, who are residents of State R, are the two partners of X&Y, a partnership established in State R which provides legal services. For tax purposes, State R treats partnerships as transparent entities. Between 15 July 00 and 14 July 01, Y is present in State S for a period or periods of 240 days and during that period, 55 per cent of all the fees of X&Y attributable to X&Y's active business activities are derived from the services that Y performs in State S. Subparagraph *a)* applies in that

situation and, for the purposes of the taxation of X and Y, the services performed by Y are deemed to be performed through a permanent establishment in State S.

— Example 4: Z, a resident of State R, is one of 10 employees of ACO, a company resident of State R that provides accounting services. Between 10 April 00 and 9 April 01, Z is present in State S for a period or periods of 190 days and during that period, 12 per cent of all the gross revenues of ACO attributable to its active business activities are derived from the services that Z performs in State S. Subparagraph *a)* does not apply in that situation and, unless subparagraph *b)* applies to ACO, the alternative provision will not deem ACO to have a permanent establishment in State S.

(Added on 17 July 2008; see HISTORY)

42.39 Subparagraph *b)* addresses the situation of an enterprise that performs services in a Contracting State in relation to a particular project (or for connected projects) and which performs these through one or more individuals over a substantial period. The period or periods referred to in the subparagraph apply in relation to the enterprise and not to the individuals. It is therefore not necessary that it be the same individual or individuals who perform the services and are present throughout these periods. As long as, on a given day, the enterprise is performing its services through at least one individual who is doing so and is present in the State, that day would be included in the period or periods referred to in the subparagraph. Clearly, however, that day will count as a single day regardless of how many individuals are performing such services for the enterprise during that day.

(Added on 17 July 2008; see HISTORY)

42.40 The reference to an "enterprise … performing these services for the same project" should be interpreted from the perspective of the enterprise that provides the services. Thus, an enterprise may have two different projects to provide services to a single customer (*e.g.* to provide tax advice and to provide training in an area unrelated to tax) and whilst these may be related to a single project of the customer, one should not consider that the services are performed for the same project.

(Added on 17 July 2008; see HISTORY)

42.41 The reference to "connected projects" is intended to cover cases where the services are provided in the context of separate projects carried on by an enterprise but these projects have a commercial coherence (see paragraphs 5.3 and 5.4 above). The determination of whether projects are connected will depend on the facts and circumstances of each case but factors that would generally be relevant for that purpose include:

— whether the projects are covered by a single master contract;

— where the projects are covered by different contracts, whether these different contracts were concluded with the same person or with related persons and whether the conclusion of the additional contracts would reasonably have been expected when concluding the first contract;

— whether the nature of the work involved under the different projects is the same;

— whether the same individuals are performing the services under the different projects.

(Added on 17 July 2008; see HISTORY)

42.42 Subparagraph *b)* requires that during the relevant periods, the enterprise is performing services through individuals who are performing such services in that other State. For that purpose, a period during which individuals are performing services means a period during which the services are actually provided, which would normally correspond to the working days of these individuals. An enterprise that agrees to keep personnel available in case a client needs the services of such personnel and charges the client standby charges for making such personnel available is performing services through the relevant individuals even though they are idle during the working days when they remain available.

(Added on 17 July 2008; see HISTORY)

42.43 As indicated in paragraph 42.32, for the purposes of the alternative provision, the individuals through whom an enterprise provides services will be the individuals referred to in paragraph 10 above. If, however, an individual is providing the services on behalf of one enterprise, the exception included in the last sentence of the provision clarifies that the services performed by that individual will only be taken into account for another enterprise if the work of that individual is exercised under the supervision, direction or control of the last-mentioned enterprise. Thus, for example, where a company that has agreed by contract to provide services to third parties provides these services through the employees of a separate enterprise (*e.g.* an enterprise providing outsourced services), the services performed through these employees will not be taken into account for purposes of the application of subparagraph *b)* to the company that entered into the contract to provide services to third parties. This rule applies regardless of whether the separate enterprise is associated to, or independent from, the company that entered into the contract.

(Added on 17 July 2008; see HISTORY)

42.44 The following examples illustrate the application of subparagraph *b)* (assuming that the alternative provision has been included in a treaty between States R and S):

— Example 1: X, a company resident of State R, has agreed with company Y to carry on geological surveys in various locations in State S where company Y owns exploration rights. Between 15 May 00 and 14 May 01, these surveys are carried on over 185 working days by employees of X as well as by self-employed individuals to whom X has sub-contracted part of the work but who work under the direction, supervision or control of X. Since subparagraph *b)* applies in that situation, these services shall be deemed to be performed through a permanent establishment of X in State S.

— Example 2: Y, a resident of State T, is one of the two shareholders and employees of WYCO, a company resident of State R that provides training services. Between 10 June 00 and 9 June 01, Y performs services in State S under a contract that WYCO has concluded with a company which is a resident of State S to train the employees of that company. These services are performed in State S over 185 working days. During the period of Y's presence in State S, the revenues from these services account for 40 per cent of the gross revenues of WYCO from its active business activities. Whilst subparagraph *a)* does not apply in that situation, subparagraph *b)* applies and these services shall be deemed to be performed through a permanent establishment of WYCO in State S.

— Example 3: ZCO, a resident of State R, has outsourced to company OCO, which is a resident of State S, the technical support that it provides by telephone to its clients. OCO operates a call centre for a number of companies similar to ZCO. During the period of 1 January 00 to 31 December 00, the employees of OCO provide technical support to various clients of ZCO. Since the employees of OCO are not under the supervision, direction or control of ZCO, it cannot be considered, for the purposes of subparagraph *b)*, that ZCO is performing services in State S through these employees. Additionally, whilst the services provided by OCO's employees to the various clients of ZCO are similar, these are provided under different contracts concluded by ZCO with unrelated clients: these services cannot, therefore, be considered to be rendered for the same or connected projects.

(Added on 17 July 2008; see HISTORY)

42.45 The 183-day thresholds provided for in the alternative provision may give rise to the same type of abuse as is described in paragraph 18 above. As indicated in that paragraph, legislative or judicial anti-avoidance rules may apply to prevent such abuses. Some States, however, may prefer to deal with

them by including a specific provision in the Article. Such a provision could be drafted along the following lines:

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> For the purposes of paragraph [x], where an enterprise of a Contracting State that is performing services in the other Contracting State is, during a period of time, associated with another enterprise that performs substantially similar services in that other State for the same project or for connected projects through one or more individuals who, during that period, are present and performing such services in that State, the first-mentioned enterprise shall be deemed, during that period of time, to be performing services in the other State for that same project or for connected projects through these individuals. For the purpose of the preceding sentence, an enterprise shall be associated with another enterprise if one is controlled directly or indirectly by the other, or both are controlled directly or indirectly by the same persons, regardless of whether or not these persons are residents of one of the Contracting States.

(Added on 17 July 2008; see HISTORY)

42.46 According to the provision, the activities carried on in the other State by the individuals referred to in subparagraph *a)* or *b)* through which the services are performed by the enterprise during the period or periods referred to in these subparagraphs are deemed to be carried on through a permanent establishment that the enterprise has in that other State. The enterprise is therefore deemed to have a permanent establishment in that other State for the purposes of all the provisions of the Convention (including, for example, paragraph 5 of Article 11 and paragraph 2 of Article 15) and the profits derived from the activities carried on in the other State in providing these services are attributable to that permanent establishment and are therefore taxable in that State pursuant to Article 7.

(Added on 17 July 2008; see HISTORY)

42.47 By deeming the activities carried on in performing the relevant services to be carried on through a permanent establishment that the enterprise has in a Contracting State, the provision allows the application of Article 7 and therefore, the taxation, by that State, of the profits attributable to these activities. As a general rule, it is important to ensure that only the profits derived from the activities carried on in performing the services are taxed; whilst there may be certain exceptions, it would be detrimental to the cross-border trade in services if payments received for these services were taxed regardless of the direct or indirect expenses incurred for the purpose of performing these services.

(Added on 17 July 2008; see HISTORY)

42.48 This alternative provision will not apply if the services performed are limited to those mentioned in paragraph 4 of Article 5 which, if performed through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph. Since the provision refers to the performance of services by the enterprise and this would not cover services provided to the enterprise itself, most of the provisions of paragraph 4 would not appear to be relevant. It may be, however, that the services that are performed are exclusively of a preparatory or auxiliary character (*e.g.* the supply of information to prospective customers when this is merely preparatory to the conduct of the ordinary business activities of the enterprise; see paragraph 23 above) and in that case, it is logical not to consider that the performance of these services will constitute a permanent establishment.

(Added on 17 July 2008; see HISTORY)

Observations on the Commentary

43. Concerning paragraph 26.1, *Germany* reserves its position on whether and under which circumstances the acquisition of a right of disposal over the transport capacity of pipelines or the capacity of technical installations, lines and cables for the transmission of electrical power or communications (including the distribution of radio and television programs) owned by an unrelated third party could result in disposal over the pipeline, cable or line as a fixed place of business.

(Replaced on 22 July 2010; see HISTORY)

44. The *Czech Republic* and the *Slovak Republic* would add to paragraph 25 their view that when an enterprise has established an office (such as a commercial representation office) in a country, and the employees working at that office are substantially involved in the negotiation of contracts for the import of products or services into that country, the office will in most cases not fall within paragraph 4 of Article 5. Substantial involvement in the negotiations exists when the essential parts of the contract — the type, quality, and amount of goods, for example, and the time and terms of delivery — are determined by the office. These activities form a separate and indispensable part of the business activities of the foreign enterprise, and are not simply activities of an auxiliary or preparatory character.

(Amended on 28 January 2003; see HISTORY)

45. Regarding paragraph 38, *Mexico* believes that the arm's length principle should also be considered in determining whether or not an agent is of an independent status for purposes of paragraph 6 of the Article and wishes,

when necessary, to add wording to its conventions to clarify that this is how the paragraph should be interpreted.

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(Amended on 28 January 2003; see HISTORY)

45.1 *Germany*, as regards sentence 3 of paragraph 17, takes the view that business activities limited to on-site planning and supervision over a construction project can only constitute a permanent establishment if they meet the requirements specified in paragraph 1 of Article 5.

(Added on 15 July 2014; see HISTORY)

45.2 *Italy* and *Portugal* deem as essential to take into consideration that — irrespective of the meaning given to the third sentence of paragraph 1.1 — as far as the method for computing taxes is concerned, national systems are not affected by the new wording of the model, *i.e.* by the elimination of Article 14.

(Added on 29 April 2000; see HISTORY)

45.3 The *Czech Republic* has expressed a number of explanations and reservations on the report on "Issues Arising Under Article 5 of the OECD Model Tax Convention". In particular, the Czech Republic does not agree with the interpretation mentioned in paragraphs 5.3 (first part of the paragraph) and 5.4 (first part of the paragraph). According to its policy, these examples could also be regarded as constituting a permanent establishment if the services are furnished on its territory over a substantial period of time.

(Added on 28 January 2003; see HISTORY)

45.4 As regards paragraph 17, the *Czech Republic* adopts a narrower interpretation of the term "installation project" and therefore, it restricts it to an installation and assembly related to a construction project. Furthermore, the Czech Republic adheres to an interpretation that supervisory activities will be automatically covered by paragraph 3 of Article 5 only if they are carried on by the building contractor. Otherwise, they will be covered by it, but only if they are expressly mentioned in this special provision. In the case of an installation project not in relation with a construction project and in the case that supervisory activity is carried on by an enterprise other than the building contractor and it is not expressly mentioned in paragraph 3 of Article 5, then these activities are automatically subject to the rules concerning the taxation of income derived from the provision of other services.

(Added on 28 January 2003; see HISTORY)

45.5 In relation to paragraphs 42.1 to 42.10, the *United Kingdom* takes the view that a server used by an e-tailer, either alone or together with web sites, could not as such constitute a permanent establishment.

(Added on 28 January 2003; see HISTORY)

45.6 *Chile* and *Greece* do not adhere to all the interpretations in paragraphs 42.1 to 42.10.

(Replaced on 22 July 2010; see HISTORY)

45.7 *Germany* does not agree with the interpretation of the "painter example" in paragraph 4.5 which it regards as inconsistent with the principle stated in the first sentence of paragraph 4.2, thus not giving rise to a permanent establishment under Article 5 paragraph 1 of the Model Convention. As regards the example described in paragraph 5.4, Germany would require that the consultant has disposal over the offices used apart from his mere presence during the training activities.

(Added on 15 July 2005; see HISTORY)

45.8 *Germany* reserves its position concerning the scope and limits of application of guidance in sentences 2 and 5 to 7 in paragraph 6, taking the view that in order to permit the assumption of a fixed place of business, the necessary degree of permanency requires a certain minimum period of presence during the year concerned, irrespective of the recurrent or other nature of an activity. Germany does in particular not agree with the criterion of economic nexus — as described in sentence 6 of paragraph 6 — to justify an exception from the requirements of qualifying presence and duration.

(Added on 15 July 2005; see HISTORY)

45.9 *Germany*, as regards paragraph 33.1 (with reference to paragraphs 32 and 6), attaches increased importance to the requirement of minimum duration of representation of the enterprise under Article 5 paragraph 5 of the Model Convention in the absence of a residence and/or fixed place of business of the agent in the source country. Germany therefore in these cases takes a particularly narrow view on the applicability of the factors mentioned in paragraph 6.

(Added on 15 July 2005; see HISTORY)

45.10 *Italy* wishes to clarify that, with respect to paragraphs 33, 41, 41.1 and 42, its jurisprudence is not to be ignored in the interpretation of cases falling in the above paragraphs.

(Added on 15 July 2005; see HISTORY)

45.11 *Portugal* wishes to reserve its right not to follow the position expressed in paragraphs 42.1 to 42.10.

(Added on 17 July 2008; see HISTORY)

Reservations on the Article

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Paragraph 1

46. *Australia* reserves the right to treat an enterprise as having a permanent establishment in a State if it carries on activities relating to natural resources or operates substantial equipment in that State with a certain degree of continuity, or a person — acting in that State on behalf of the enterprise — manufactures or processes in that State goods or merchandise belonging to the enterprise.

(Amended on 17 July 2008; see HISTORY)

47. Considering the special problems in applying the provisions of the Model Convention to offshore hydrocarbon exploration and exploitation and related activities, *Canada*, *Denmark*, *Ireland*, *Norway* and the *United Kingdom* reserve the right to insert in a special article provisions related to such activities.

(Renumbered on 22 July 2010; see HISTORY)

48. *Chile* reserves the right to deem an enterprise to have a permanent establishment in certain circumstances where services are provided.

(Replaced on 22 July 2010; see HISTORY)

49. The *Czech Republic* and the *Slovak Republic*, whilst agreeing with the "fixed place of business" requirement of paragraph 1, reserve the right to propose in bilateral negotiations specific provisions clarifying the application of this principle to arrangements for the performance of services over a substantial period of time.

(Renumbered on 22 July 2010; see HISTORY)

50. *Greece* reserves the right to treat an enterprise as having a permanent establishment in Greece if the enterprise carries on planning, supervisory or consultancy activities in connection with a building site or construction or installation project lasting more than six months, if scientific equipment or machinery is used in Greece for more than three months by the enterprise in the exploration or extraction of natural resources or if the enterprise carries out more than one separate project, each one lasting less than six months, in the same period of time (*i.e.* within a calendar year).

(Added on 23 July 1992; see HISTORY)

51. *Greece* reserves the right to insert special provisions relating to offshore activities.

(Renumbered on 22 July 2010; see HISTORY)

52. *Estonia* and *Mexico* reserve the right to tax individuals performing professional services or other activities of an independent character if they are

present in these States for a period or periods exceeding in the aggregate 183 days in any twelve month period.

(Amended on 15 July 2014; see HISTORY)

53. *New Zealand* reserves the right to insert provisions that deem a permanent establishment to exist if, for more than six months, an enterprise conducts activities relating to the exploration or exploitation of natural resources or uses or leases substantial equipment.

(Renumbered on 22 July 2010; see HISTORY)

54. *Turkey* reserves the right to treat a person as having a permanent establishment in Turkey if the person performs professional services and other activities of independent character, including planning, supervisory or consultancy activities, with a certain degree of continuity either directly or through the employees of a separate enterprise.

(Renumbered on 22 July 2010; see HISTORY)

Paragraph 2

55. *Canada*, *Chile* and *Israel* reserve the right in subparagraph 2 *f*) to replace the words "of extraction" with the words "relating to the exploration for or the exploitation".

(Amended on 15 July 2014; see HISTORY)

56. *Greece* reserves the right to include paragraph 2 of Article 5 as it was drafted in the 1963 Draft Convention.

(Renumbered on 22 July 2010; see HISTORY)

Paragraph 3

57. *Australia*, *Chile*, *Greece*, *Korea*, *New Zealand*, *Portugal* and *Turkey* reserve their positions on paragraph 3, and consider that any building site or construction or installation project which lasts more than six months should be regarded as a permanent establishment.

(Renumbered and amended on 22 July 2010; see HISTORY)

58. *Australia* reserves the right to treat an enterprise as having a permanent establishment in a State if it carries on in that State supervisory or consultancy activities for more than 183 days in any twelve month period in connection with a building site or construction or installation project in that State.

(Replaced on 22 July 2010; see HISTORY)

59. *Korea* reserves its position so as to be able to tax an enterprise which carries on supervisory activities for more than six months in connection with

a building site or construction or installation project lasting more than six months.

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(Renumbered on 22 July 2010; see HISTORY)

60. *Slovenia* reserves the right to include connected supervisory or consultancy activities in paragraph 3 of the Article.

(Amended and renumbered on 22 July 2010; see HISTORY)

61. *Mexico* and the *Slovak Republic* reserve the right to tax an enterprise that carries on supervisory activities for more than six months in connection with a building site or a construction, assembly, or installation project.

(Renumbered and amended on 22 July 2010; see HISTORY)

62. *Mexico* and the *Slovak Republic* reserve their position on paragraph 3 and consider that any building site or construction, assembly, or installation project that lasts more than six months should be regarded as a permanent establishment.

(Renumbered on 22 July 2010; see HISTORY)

63. *Poland* and *Slovenia* reserve the right to replace "construction or installation project" with "construction, assembly, or installation project".

(Renumbered and amended on 22 July 2010; see HISTORY)

64. *Portugal* reserves the right to treat an enterprise as having a permanent establishment in Portugal if the enterprise carries on an activity consisting of planning, supervising, consulting, any auxiliary work or any other activity in connection with a building site or construction or installation project lasting more than six months, if such activities or work also last more than six months.

(Renumbered on 22 July 2010; see HISTORY)

65. The *United States* reserves the right to add "a drilling rig or ship used for the exploration of natural resources" to the activities covered by the twelve month threshold test in paragraph 3.

(Renumbered and amended on 22 July 2010; see HISTORY)

Paragraph 4

66. *Chile* reserves the right to amend paragraph 4 by eliminating subparagraph *f*) and replacing subparagraph *e*) with the corresponding text of the 1963 Draft Model Tax Convention.

(Added on 22 July 2010; see HISTORY)

67. *Mexico* reserves the right to exclude subparagraph *f)* of paragraph 4 of the Article to consider that a permanent establishment could exist where a fixed

place of business is maintained for any combination of activities mentioned in subparagraphs *a)* to *e)* of paragraph 4.

(Renumbered on 22 July 2010; see HISTORY)

Paragraph 6

68. *Estonia* and *Slovenia* reserve the right to amend paragraph 6 to make clear that an agent whose activities are conducted wholly or almost wholly on behalf of a single enterprise will not be considered an agent of an independent status.

(Amended on 15 July 2014; see HISTORY)

HISTORY

Title: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, the title read as follows:

"COMMENTARY ON ARTICLE 5 CONCERNING PERMANENT ESTABLISHMENT"

Paragraph 1: Replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 1 of the 1963 Draft Convention was deleted and a new paragraph 1 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the 1977 Model Convention was adopted, paragraph 1 read as follows:

"1. The permanent establishment Article is the result of a good deal of discussion and much careful thought and consideration. During the drafting of the Article a number of proposals and suggestions were made which for good reason were finally rejected. In view of this, the Commentary does not restrict itself to giving the reasons for, and putting a gloss on, the proposals now contained in the Article. It also mentions the reasons for the rejection or omission of a number of the more important proposals that were not ultimately adopted, since these omissions are themselves of some significance and the reasons for them may be of interest."

Paragraph 1.1: Added on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of the Annex of another report entitled "Issues Related to Article 14 of the OECD Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 27 January 2000).

Paragraph 2: Replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 2 of the 1963 Draft Convention was deleted and a new paragraph 2 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of 1977 Model Convention, paragraph 2 read as follows:

"2. For the sake of clarity, it is preferable to have a general definition of the concept of "permanent establishment" which is set out in a separate paragraph and not one which is almost hidden in a list of a number of agreed examples, as is the case in Article V, paragraph 1, of the Mexico and London Drafts of the Model Tax Convention published by the League of Nations. For this reason, the Article begins in paragraph 1 by attempting a general definition of "permanent establishment". This general definition attempts to bring out the essential characteristic of a

permanent establishment, viz. that it has a distinct "situs", a "fixed place of business"."

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Paragraph 3: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 3 read as follows:

"3. It could perhaps be argued that in the terms of the general definition some mention should also be made of the other characteristic of a permanent establishment to which some importance is attached in the Commentary on the Mexico and London Drafts, namely that, in the words of that Commentary, the establishment "must have a productive character — *i.e.* contribute to business earnings". In the present permanent establishment Article this course has not been taken. Within the framework of a well run business organisation it is surely axiomatic to assume that each part contributes to the productivity of the whole. It does not, of course, follow in every case that because in the wider context of the whole organisation a particular establishment has a "productive character" it is consequently an establishment to which profits can properly be attributed for the purpose of tax in a particular territory (see the Commentary on paragraph 3)."

Paragraph 4: Replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 4 of the 1963 Draft Convention was deleted and a new paragraph 4 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 4 read as follows:

"4. The criterion of "productive character" having been rejected, it would have been possible as an alternative to add to the general definition as it is now drafted in paragraph 1 of the Article the criterion of "profitability". This course was not taken mainly because the concept of profitability did not seem wholly relevant. There seemed to be three possible ways of distinguishing such a concept. First, it would be possible to add at the end of the general definition as it now stands in paragraph 1, the words "and through which profits are made or realised" or some similar formula. But this is clearly unsatisfactory because a permanent establishment which makes profits one year may not do so the next and it would be a most unfortunate result if, because of fluctuations in profitability, certain business activities were deemed to constitute a permanent establishment in one year and not in the next. To some extent this difficulty could be surmounted by taking the second course and adopting a formula on the lines "and through which, taking one year with another, profits are made or realised", but this is by no means a complete answer to the problem, because even a branch establishment which year after year itself makes a loss may, nevertheless, in the context of the whole enterprise of which it is a part, "contribute to business earnings" in the sense that the League of Nations' Commentary seems to have meant. The third course is to draft an addition to the general definition in a manner which pays no regard to the question whether the establishment does or does not make distinguishable profits and to adopt the formula "... in which the business of the enterprise is wholly or partly carried on with the intention of realising profits". In many respects this third course could perhaps be regarded as the most satisfactory of the three, because it ignores what may be the actual accounting results of the enterprise and attempts to define its inherent profitability. But as will be seen, it is based upon a test not of fact but of motive and this is clearly a serious objection. To import a motive test into a set of rules intended to define with precision the taxation liabilities of individuals and companies is wholly undesirable and obviously unacceptable on that ground alone."

Paragraph 4.1: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 4.2: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 4.3: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 4.4: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 4.5: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 4.6: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 5: Amended on 23 July 1992, by replacing the cross reference to "paragraph 19" by a reference to "paragraph 20" (see history of paragraph 20) by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 5 read as follows:

> "5. According to the definition, the place of business has to be a "fixed" one. Thus in the normal way there has to be a link between the place of business and a specific geographical point. It is immaterial how long an enterprise of a Contracting State operates in the other Contracting State if it does not do so at a distinct place, but this does not mean that the equipment constituting the place of business has to be actually fixed to the soil on which it stands. It is enough that the equipment remains on a particular site (but cf. paragraph 19 below)."

Paragraph 5 of the 1977 Model Convention replaced paragraph 5 of the 1963 Draft Convention when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 5 of the 1963 Draft Convention was deleted and a new paragraph 5 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 5 read as follows:

> "5. The general definition in paragraph 1 of the Article has, therefore, been drafted in its present form because it is the one which gives the greatest clarity and which promises to be the easiest to administer. There follows in paragraph 2 a list

of prima facie examples of permanent establishments. In paragraph 3 there is provided a list of specific exceptions which, although they involve a fixed place of business should be excepted from the general rule in order to foster international trade or for convenience of administration. It is not, of course, suggested that the list in paragraph 2 is exhaustive. The last words of paragraph 3 (*e*) also provide a generalised exception to the general definition laid down in paragraph 1. These words have the effect of restricting to some extent the effect of paragraph 1 and go some way to meeting criticism that the scope of the general definition is too wide."

Paragraph 5.1: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 5.2: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 5.3: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 5.4: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 5.5: Added on 22 July 2010 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 6: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). In the 1977 Model Convention and until 28 January 2003, paragraph 6 read as follows:

"6. Since the place of business must be fixed, it also follows that a permanent establishment can be deemed to exist only if the place of business has a certain degree of permanency, *i.e.* if it is not of a purely temporary nature. If the place of business was not set up merely for a temporary purpose, it can constitute a permanent establishment, even though it existed, in practice, only for a very short period of time because of the special nature of the activity of the enterprise or because, as a consequence of special circumstances (*e.g.* death of the taxpayer, investment failure), it was prematurely liquidated. Where a place of business which was, at the outset, designed for a short temporary purpose only, is maintained for such a period that it cannot be considered as a temporary one, it becomes a fixed place of business and thus — retrospectively — a permanent establishment."

Paragraph 6 of the 1977 Model Convention replaced paragraph 6 of the 1963 Draft Convention when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 6 of the 1963 Draft Convention was deleted and a new paragraph 6 was added. In the 1963 Draft Convention (adopted by the OECD

Council on 30 July 1963) and until the adoption of it the 1977 Model Convention, paragraph 6 read as follows:

> "6. During the drafting of the permanent establishment Article a good deal of consideration was given to the question whether it should contain some special provision for itinerant merchants, pedlars and watermen. After careful consideration it was decided that in such cases there should only be deemed to be a permanent establishment if there is a fixed place of business. Itinerants of this kind are, in general, subject to tax in the country of residence. A special provision to deal with these people seems unnecessary because their income will, in general be small and it is likely to be most difficult to tax them in any country except the one in which they reside. Moreover, any loss of tax which a country may suffer through giving up its right to tax itinerants from other countries is likely to be more or less compensated by the fact it will have the sole right to tax itinerants residing within its own borders. It may be, of course, that countries with common frontiers will regard this problem as of sufficient importance to merit some special provision."

Paragraph 6.1: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 6.2: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 6.3: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 7: Replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 7 of the 1963 Draft Convention was deleted and a new paragraph 7 was added. In addition, the heading preceding paragraph 7 was moved immediately before paragraph 11. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 7 read as follows:

> "7. This paragraph contains a list, by no means exhaustive, of examples each of which can be regarded a priori as constituting a "permanent establishment". In the many bilateral Conventions concluded between O.E.C.D. Member countries there can, of course, be found other examples which, because of their importance in relation to the domestic taxation law of one or both of the contracting parties, have an equally strong claim to be included in this paragraph. In drafting this paragraph there were, however, three possible courses. First, there could have been compiled a composite paragraph which would necessarily have been of considerable length and would in effect have consolidated and brought together all the particular instances of permanent establishments which Member countries have found it convenient to include in their Conventions with one another. Secondly, there could have been drawn up a paragraph of medium length, selecting some of the more usual examples from existing bilateral Conventions and rejecting others, giving reasons for the choice. Finally, it would have been possible to take the minimum list of those examples common to, and agreed between Member countries. The

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method finally selected was to a considerable degree dictated by the nature of the task with which the draftsmen of the Article were faced. The main purpose of preparing a new permanent establishment Article was to delimit with some degree of precision the common ground between Member countries, in other words to compile an Article which Member countries would be able to accept with a minimum of discussion. With this purpose in mind it would have been a singularly useless exercise to pursue the first of the courses outlined above; the resulting Article would have been of inordinate length and many of its examples would have been completely inapplicable to the circumstances of a large number of Member countries. Similarly with the second course; to select from the many Conventions which exist examples worthy of inclusion would have been somewhat invidious and, unless the selection had been based on an extremely precise and detailed knowledge of the domestic law of each Member country — in the nature of things a most difficult test to satisfy — would have been scarcely less than impertinent. Moreover, the resulting Article would have suffered from many of the defects inherent in the first of the courses mentioned above; some of its examples would have been inapplicable to the circumstances of many Member countries."

Paragraph 8: Amended on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992 on the basis of a previous report entitled "The Taxation of Income Derived from the Leasing of Industrial, Commercial or Scientific Equipment" (adopted by the OECD Council on 13 September 1983). In the 1977 Model Convention and until 23 July 1992, paragraph 8 read as follows:

"8. Where tangible property such as facilities, equipment, buildings, or intangible property such as patents, procedures and similar property, are let or leased to third parties through a fixed place of business maintained by an enterprise of a Contracting State in the other State, this activity will, in general, render the place of business a permanent establishment. The same applies if capital is made available through a fixed place of business. If an enterprise of a State lets or leases facilities, equipment, buildings or intangible property to an enterprise of the other State without maintaining for such letting or leasing activity a fixed place of business in the other State, the leased facility, equipment, building or intangible property, as such, will not constitute a permanent establishment of the lessor provided the contract is limited to the mere leasing of the equipment, etc. This remains the case even when, for example, the lessor supplies personnel after installation to operate the equipment provided that their responsibility is limited solely to the operation or maintenance of the equipment under the direction, responsibility and control of the lessee. If the personnel have wider responsibilities, for example, participation in the decisions regarding the work for which the equipment is used, the activity of the lessor may go beyond the mere leasing of equipment and may constitute an entrepreneurial activity. In such a case a permanent establishment could be deemed to exist if the criterion of permanency is met. When such activity is connected with, or is similar in character to, those mentioned in paragraph 3, the time limit of twelve months applies. Other cases have to be determined according to the circumstances."

Paragraph 8 of the 1977 Model Convention replaced paragraph 8 of the 1963 Draft Convention when the 1977 Model Convention was adopted on 11 April 1977. At that time, paragraph 8 of the 1963 Draft Convention was deleted and a new paragraph 8 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 8 read as follows:

"8. It is, therefore, the third course which has been taken. Basing itself on Article V of the Mexico and London Drafts, the Article attempts to comprise a list

of examples which represent common ground on which Member countries are able to agree. There has been included in paragraph 2 most of the examples given in sub-paragraph 1 of Article V of the Mexico and London Drafts; there is, however, one addition and there are one or two exceptions. There has been added "place of management"; it is considered that this example should be specially mentioned since a "place of management" need not necessarily be an "office". On the other hand, it did not seem necessary to include "head office". Insofar as this term is not covered, like "professional premises" which has also been omitted, by the general term "office" it seemed that the "head office" of an organisation would normally be a "place of management". "Installations" has also been left out as being a term so general as to be virtually meaningless. The terms "building site or construction or assembly project" cover constructional activities such as excavating or dredging. The provision that a building site or assembly project shall only be deemed to be a permanent establishment if it exists for more than twelve months is not intended to prevent a country from raising a tax assessment before a year has expired if it appears that the site or project is likely to last for more than twelve months. The period of twelve months may, of course, fall, in part, into more than one fiscal year."

Paragraph 9: Replaced on 23 July 1992 when paragraph 9 of the 1977 Model Convention was amended and renumbered as paragraph 10 (see history of paragraph 10) and a new paragraph 9 was added by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 9.1: Added on 22 July 2010 by the report entitled the "2010 Update to the Model Tax Convention" adopted by the OECD Council on 22 July 2010.

Paragraph 10: Corresponds to paragraph 9 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 10 of the 1977 Model Convention was renumbered as paragraph 11 (see history of paragraph 11) and paragraph 9 of the 1977 Model Convention was renumbered as paragraph 10 and amended, by replacing the cross reference therein to paragraph 34 by a reference to paragraph 35, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 9 read as follows:

"9. The business of an enterprise is carried on mainly by the entrepreneur or persons who are in a paid-employment relationship with the enterprise (personnel). This personnel includes employees and other persons receiving instructions from the enterprise (*e.g.* dependent agents). The powers of such personnel in its relationship with third parties are irrelevant. It makes no difference whether or not the dependent agent is authorised to conclude contracts if he works at the fixed place of business (cf. paragraph 34 below). But a permanent establishment may nevertheless exist if the business of the enterprise is carried on mainly through automatic equipment, the activities of the personnel being restricted to setting up, operating, controlling and maintaining such equipment. Whether or not gaming and vending machines and the like set up by an enterprise of a State in the other State constitute a permanent establishment thus depends on whether or not the enterprise carries on a business activity besides the initial setting up of the machines. A permanent establishment does not exist if the enterprise merely sets up the machines and then leases the machines to other enterprises. A permanent establishment may exist, however, if the enterprise which sets up the machines also operates and maintains them for its own account. This also applies if the machines are operated and maintained by an agent dependent on the enterprise."

Paragraph 9 of the 1977 Model Convention replaced paragraph 9 of the 1963 Draft Convention when the 1977 Model Convention was adopted by the OECD Council on 11

April 1977. At that time, paragraph 9 of the 1963 Draft Convention was deleted and a new paragraph 9 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 9 read as follows:

> "9. During the drafting of the Article it was proposed that the term "warehouse" should be included as a separate item in paragraph 2. This example has been traditionally included in similar Articles as sufficiently important to merit particular mention. The purpose of including the term was, of course, to cover those warehouses in which the business of letting storage space or other facilities to third parties was carried on. The insertion of the term was not intended to treat as a permanent establishment a warehouse controlled by an enterprise, but used only for the storage, etc., of its own goods. It was, however, suggested that to insert the term would cause confusion and that the term "warehouse" in paragraph 2 read together with a) and b) of paragraph 3 would be misleading. It was accordingly decided not to include the term "warehouse" in paragraph 2. A warehouse in which the business of letting facilities for storage, etc. to third parties is carried on will be a permanent establishment under the general definition of paragraph 1 even though it is not specifically mentioned in the list of examples in paragraph 2. Paragraph 3, however, makes it clear that a warehouse is not a permanent establishment if it is used by the enterprise which controls it merely for the purpose of storage, etc."

Paragraph 11: Corresponds to paragraph 10 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 11 of the 1977 Model Convention was renumbered as paragraph 12 (see history of paragraph 12), the heading preceding paragraph 11 was moved with it and paragraph 10 of the 1977 Model Convention was renumbered as paragraph 11 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 10 of the 1977 Model Convention replaced paragraph 10 of the 1963 Draft Convention when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 10 of the 1963 Draft Convention was deleted and a new paragraph 10 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 10 read as follows:

> "10. This paragraph contains, first, a number of examples of forms of business activity which should not be treated as constituting permanent establishments even though the activity is carried on in a fixed place of business and, secondly, in the last few words of sub-paragraph e), a generalised exception to the rule laid down in paragraph 1 that a "fixed place of business in which the business of the enterprise is wholly or partly carried on" shall be regarded a priori as a permanent establishment."

Paragraph 12: Corresponds to paragraph 11 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 12 of the 1977 Model Convention was renumbered as paragraph 13 (see history of paragraph 13), paragraph 11 of the 1977 Model Convention was renumbered as paragraph 12 and the heading preceding paragraph 11 was moved with it, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 11 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 11 of the 1963 Draft Convention was amended and renumbered as paragraph 21 (see history of paragraph 22), the heading preceding paragraph 7 was moved immediately before paragraph 11 and a new paragraph 11 was added.

Paragraph 13: Corresponds to paragraph 12 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 13 of the 1977 Model Convention was renumbered as paragraph 14 (see history of paragraph 14) and paragraph 12 of the 1977 Model Convention was renumbered as paragraph 13 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 12 of the 1977 Model Convention replaced paragraph 12 of the 1963 Draft Convention when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 12 of the 1963 Draft Convention was deleted and a new paragraph 12 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 12 read as follows:

> "12. Comment is perhaps called for on the examples mentioned in paragraph 3 *e*). It is recognised that a place of business the function of which is solely that of advertising, or the supply of information, or of scientific research may well contribute to the productivity of its parent enterprise. To assume so is once more axiomatic. But the services it performs for its parent enterprise are so far antecedent to the actual realisation of profits by its parent body that no profits can properly be allocated to it; accordingly it does not constitute a taxable unit. It should, of course, be emphasised that exemption should be given only so long as the place of business completely satisfies the conditions laid down. If, for example, the research establishment were to concern itself with manufacture, then exemption would be forfeited."

Paragraph 14: Corresponds to paragraph 13 of the 1977 Model Convention. On that date paragraph 14 of the 1977 Model Convention was renumbered as paragraph 15 (see history of paragraph 15) and paragraph 13 of the 1977 Model Convention was renumbered as paragraph 14 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 13 of the 1977 Model Convention replaced paragraph 13 of the 1963 Draft Convention when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 13 of the 1963 Draft Convention was deleted and a new paragraph 13 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 13 read as follows:

> "13. The last words of sub-paragraph *e*), "or for similar activities which have a preparatory or auxiliary character for the enterprise" require a special explanation of their own. The purpose of these words is twofold. In the first place, since it would be unreasonable to seek to claim that the list of examples quoted in paragraph 3 is, or in the nature of things could hope to be exhaustive, the last words of sub-paragraph *e)* are intended to cover any further examples (such as the organisation maintained solely for the purposes of servicing a patent or "know-how" contract) which are not listed among the exceptions in paragraph 3 but are nevertheless within the spirit of them. The words in question are, therefore, intended to make it unnecessary to attempt to produce an exhaustive list of exceptions which, even if it were comprehensive, would inevitably be of inordinate length and undesirable rigidity. In the second place, the words extend the principle underlying the examples in sub-paragraph *e)* to provide a generalised exception to the general definition in paragraph 1. To a considerable degree they delimit that definition and exclude from its rather wide scope a number of forms of business organisation which, although they are carried on in a fixed place of business, should not be treated as taxable units. To put the matter in another way, the last words of subparagraph *e)* refine the general definition in paragraph 1 and, when read with that paragraph, provide a more selective test by which to determine what constitutes a properly taxable permanent establishment. In view of the examples

given, the reference to "similar activities" cannot lead to an arbitrary extension of the exemption set out in paragraph 3 *e)*. It will, of course, be the responsibility of the enterprise to prove that the activities in question are of a preparatory or auxiliary character within the framework of the whole activities of the enterprise. If, for example, the results of the research carried on in a laboratory are not only used by the enterprise but are also sold to a third party, the paragraph would cease to apply. Alternatively, it would be possible for countries to include in bilateral agreements a provision that, where the results of the laboratory's research are used partly by the enterprise and in part are sold to third parties, the charge to tax on the permanent establishment should be limited to the profits arising from the sales to third parties. Such a provision would be analogous to the provisions relating to "mere purchase" in a number of Conventions."

Paragraph 15: Corresponds to paragraph 14 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 15 of the 1977 Model Convention was renumbered as paragraph 16 (see history of paragraph 16), the heading preceding paragraph 15 was moved with it and paragraph 14 of the 1977 Model Convention was renumbered as paragraph 15 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 14 of the 1977 Model Convention replaced paragraph 14 of the 1963 Draft Convention when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 14 of the 1963 Draft Convention and the headings preceding it were deleted and a new paragraph 14 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 14 and the preceding headings read as follows:

"*Paragraph 4*

DEPENDENT AGENTS AND EMPLOYEES

14. Whilst in paragraph 3 of the Article certain exceptions are made to the general definition in paragraph 1, it seems necessary in conformity with the international practice hitherto followed to treat certain groups of persons as permanent establishments on account of the nature of their business activities, even though the enterprise may not have a fixed place of business."

Paragraph 16: Amended on 22 July 2010 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 28 January 2003 and until 22 July 2010, paragraph 16 read as follows:

"16. This paragraph provides expressly that a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. Any of those items which does not meet this condition does not of itself constitute a permanent establishment, even if there is within it an installation, for instance an office or a workshop within the meaning of paragraph 2, associated with the construction activity. Where, however, such an office or workshop is used for a number of construction projects and the activities performed therein go beyond those mentioned in paragraph 4, it will be considered a permanent establishment if the conditions of the Article are otherwise met even if none of the projects involve a building site or construction or installation project that lasts more than 12 months. In that case, the situation of the workshop or office will therefore be different from that of these sites or projects, none of which will constitute a permanent establishment, and it will be important to ensure that only the profits properly attributable to the functions performed and risks assumed through that office or workshop are attributed to the permanent establishment. This could include profits attributable to functions performed and risks assumed in relation to the various construction sites but only to the extent that these functions and risks are properly attributable to the office."

Paragraph 16 was previously amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). After 23 July 1992 and until 28 January 2003, paragraph 16 read as follows:

> "16. This paragraph provides expressly that a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. Any of those items which does not meet this condition does not of itself constitute a permanent establishment, even if there is within it an installation, for instance an office or a workshop within the meaning of paragraph 2, associated with the construction activity."

Paragraph 16 as it read after 23 July 1992 corresponded to paragraph 15 of the 1977 Model Convention. Paragraph 16 of the 1977 Model Convention was renumbered as paragraph 17 (see history of paragraph 17), paragraph 15 of the 1977 Model Convention was renumbered as paragraph 16 and the heading preceding paragraph 15 was moved with it, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 15 of the 1977 Model Convention replaced paragraph 15 of the 1963 Draft Convention when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 15 of the 1963 Draft Convention was deleted and a new paragraph 15 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 15 read as follows:

> "15. Persons who may be deemed to be permanent establishments must be strictly limited to those who are dependent, both from the legal and economic points of view, upon the enterprise for which they carry on business dealings (Report of the Fiscal Committee of the League of Nations, 1928, page 12). Where an enterprise has business dealings with an independent agent, this cannot be held to mean that the enterprise itself carries on a business in the other State. In such a case, there are two separate enterprises."

Paragraph 17: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). After 23 July 1992 and until 28 January 2003, paragraph 17 read as follows:

> "17. The term "building site or construction or installation project" includes not only the construction of buildings but also the construction of roads, bridges or canals, the laying of pipe-lines and excavating and dredging. Planning and supervision of the erection of a building are covered by this term, if carried out by the building contractor. However, planning and supervision is not included if carried out by another enterprise whose activities in connection with the construction concerned are restricted to planning and supervising the work. If that other enterprise has an office which it uses only for planning or supervision activities relating to a site or project which does not constitute a permanent establishment, such office does not constitute a fixed place of business within the meaning of paragraph 1, because its existence has not a certain degree of permanence."

Paragraph 17 as it read after 23 July 1992 corresponded to paragraph 16 of the 1977 Model Convention. Paragraph 17 of the 1977 Model Convention was amended and renumbered as paragraph 18 (see history of paragraph 18) and paragraph 16 of

the 1977 Model Convention was renumbered as paragraph 17 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 16 of the 1963 Draft Convention was replaced when the 1977 Model Convention when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 16 of the 1963 Draft Convention was amended and renumbered as paragraph 31 (see history of paragraph 32) and a new paragraph 16 was added.

Paragraph 18: Corresponds to paragraph 17 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 18 of the 1977 Model Convention was renumbered as paragraph 19 (see history of paragraph 19) and paragraph 17 of the 1977 Model Convention was amended and renumbered as paragraph 18 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 17 read as follows:

> "17. The twelve month test applies to each individual site or project. In determining how long the site or project has existed, no account should be taken of the time previously spent by the contractor concerned on other sites or projects which are totally unconnected with it. A building site should be regarded as a single unit, even if it is based on several contracts, provided that it forms a coherent whole commercially and geographically. Subject to this proviso, a building site forms a single unit even if the orders have been placed by several persons (*e.g.* for a row of houses)."

Paragraph 17 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 17 of the 1963 Draft Convention was deleted and a new paragraph 17 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 17 read as follows:

> "17. During the drafting of the Article, it was at one stage suggested that one of the tests that should be used to determine whether or not an agent is to be regarded as a permanent establishment should be the availability in the country in which the agent operates, and at the disposal of the agent of a stock of goods or merchandise belonging to the enterprise. This is, of course, a criterion commonly employed in bilateral Conventions for the avoidance of double taxation. For a number of reasons, this suggestion was not pursued and in its present form paragraph 4 of the Article is founded on the view that the only real criterion is the nature of the authority entrusted to the agent; in brief, whether or not he has, and habitually exercises, an authority to conclude contracts in the name of the enterprise."

Paragraph 19: Corresponds to paragraph 18 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 19 of the 1977 Model Convention was renumbered as paragraph 20 (see history of paragraph 20) and paragraph 18 of the 1977 Model Convention was renumbered as paragraph 19 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 18 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 18 of the 1963 Draft Convention was deleted and a new paragraph 18 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 18 read as follows:

> "18. Since the maintenance of a place of business exclusively for the purchase of goods or merchandise is not to constitute a permanent establishment (cf. paragraph 3 of the Article), a person should not be deemed to be a permanent

establishment merely because he has an authority to conclude contracts which is strictly limited to contracts covering the purchase of goods or merchandise."

Paragraph 19.1: Added on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000 on the basis of Annex I of another report entitled "The Application of the OECD Model Tax Convention to Partnerships" (adopted by the OECD Committee on Fiscal Affairs on 20 January 1999).

Paragraph 20: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). After 23 July 1992 and until 28 January 2003, paragraph 20 read as follows:

"20. The very nature of a construction or installation project may be such that the contractor's activity has to be relocated continuously or at least from time to time, as the project progresses. This would be the case for instance where roads or canals were being constructed, waterways dredged, or pipe-lines laid. In such a case, the fact that the work force is not present for twelve months in one particular place is immaterial. The activities performed at each particular spot are part of a single project, and that project must be regarded as a permanent establishment if, as a whole, it lasts more than twelve months."

Paragraph 20 as it read after 23 July 1992 corresponded to paragraph 19 of the 1977 Model Convention as it read before 23 July 1992. Paragraph 20 of the 1977 Model Convention was renumbered as paragraph 21 (see history of paragraph 21), the heading preceding paragraph 20 was moved with it and paragraph 19 of the 1977 Model Convention was renumbered as paragraph 20 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 19 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 19 of the 1963 Draft Convention was deleted and a new paragraph 19 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 19 read as follows:

"19. Under paragraph 4 of the Article, only one category of dependent agents, who meet specific conditions, is deemed to be permanent establishments. All independent agents and the remaining dependent ones are deemed to be permanent establishments. Mention should be made of the fact that the Mexico and London Drafts (Article V, paragraph 4, of the Protocol) and a number of Conventions, do not enumerate exhaustively such dependent agents as are deemed to be permanent establishments, but merely give examples. In the interest of preventing differences of interpretation and of furthering international economic relations, it appeared advisable to define, as exhaustively as possible, the cases where agents are deemed to be "permanent establishments"."

Paragraph 21: Corresponds to paragraph 20 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 21 of the 1977 Model Convention was renumbered as paragraph 22 (see history of paragraph 22), paragraph 20 of the 1977 Model Convention was renumbered as paragraph 21 and the heading preceding paragraph 20 was moved with it, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 20 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 20 of the 1963 Draft Convention was amended and incorporated into the

first sentence of paragraph 35 (see history of paragraph 36), the headings preceding paragraph 20 were amended and moved with it and a new paragraph 20 was added.

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Paragraph 22: Corresponds to paragraph 21 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 22 of the 1977 Model Convention was renumbered as paragraph 23 (see history of paragraph 23) and paragraph 21 was renumbered as paragraph 22 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 21 of the 1977 Model Convention corresponded to paragraph 11 of the 1963 Draft Convention. Paragraph 21 of the 1963 Draft Convention was amended and incorporated into the second sentence of paragraph 35 (see history of paragraph 36) and paragraph 11 of the 1963 Draft Convention was amended and renumbered as paragraph 21 when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 11 read as follows:

> "11. The exceptions listed in sub-paragraphs *a)* to *e)* do not require much detailed comment. The first two and the fourth are common in the bilateral Conventions concluded between Member countries. Paragraph 3 *a)* of the Article relates only to the case in which an enterprise acquires the use of facilities for storing, displaying or delivering its own goods or merchandise. Paragraph 3 *b)* relates to the stock of merchandise itself and provides that the stock shall not be treated as a permanent establishment if it is maintained for the purpose of storage, display or delivery. Paragraph 3 *c)* covers the case in which a stock of goods or merchandise belonging to one enterprise is processed by a second enterprise in another territory on behalf of, or for the account of the first-mentioned enterprise. The reference to the collection of information in paragraph 3 *d)* is intended to cover the case of the newspaper bureau which has no purpose other than to act as one of many 'tentacles' of the parent body; to exempt such a bureau is no more than an extension of the concept of "mere purchase"."

Paragraph 23: Corresponds to paragraph 22 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 23 of the 1977 Model Convention was renumbered as paragraph 24 (see history of paragraph 24) and paragraph 22 of the 1977 Model Convention was renumbered as paragraph 23 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 22 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 22 of the 1963 Draft Convention was amended and renumbered as paragraph 39 (see history of paragraph 40), the headings preceding paragraph 22 were amended and moved with it and a new paragraph 22 was added.

Paragraph 24: Corresponds to paragraph 23 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 24 of the 1977 Model Convention was amended and renumbered as paragraph 25 (see history of paragraph 25) and paragraph 23 of the 1977 Model Convention was renumbered as paragraph 24 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 23 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 23 of the 1963 Draft Convention was amended and renumbered as paragraph 40 (see history of paragraph 41) and a new paragraph 23 was added.

Paragraph 25: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent

Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). After 23 July 1992 and until 28 January 2003, paragraph 25 read as follows:

> "25. A permanent establishment could also be constituted if an enterprise maintains a fixed place of business in order to supply spare parts to customers for the machinery supplied to such customers, or to maintain or repair such machinery, as this goes beyond the pure delivery mentioned in subparagraph a) of paragraph 4. Since these after-sale organisations perform an essential and significant part of the services of an enterprise vis-à-vis its customers, their activities are not merely auxiliary ones. Subparagraph *e)* applies only if the activity of the fixed place of business is limited to a preparatory or auxiliary one. This would not be the case where, for example, the fixed place of business does not only give information but also furnishes plans etc. specially developed for the purposes of the individual customer. Nor would it be the case if a research establishment were to concern itself with manufacture."

Paragraph 25 as it read after 23 July 1992 corresponded to paragraph 24 of the 1977 Model Convention. On 23 July 1992 paragraph 25 of the 1977 Model Convention was renumbered as paragraph 26 (see history of paragraph 26) and paragraph 24 of the 1977 Model Convention was renumbered as paragraph 25 and amended, by replacing the words "or to maintain or repair" with "and to maintain and repair" in the first sentence, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 24 read as follows:

> "24. A permanent establishment could also be constituted if an enterprise maintains a fixed place of business in order to supply spare parts to customers for the machinery supplied to such customers, and to maintain and repair such machinery, as this goes beyond the pure delivery mentioned in subparagraph a) of paragraph 4. Since these after-sale organisations perform an essential and significant part of the services of an enterprise vis-à-vis its customers, their activities are not merely auxiliary ones. Subparagraph *e)* applies only if the activity of the fixed place of business is limited to a preparatory or auxiliary one. This would not be the case where, for example, the fixed place of business does not only give information but also furnishes plans etc. specially developed for the purposes of the individual customer. Nor would it be the case if a research establishment were to concern itself with manufacture."

Paragraph 24 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 24 of the 1963 Draft Convention was amended and renumbered as paragraph 41 (see history of paragraph 42) and a new paragraph 24 was added.

Paragraph 26: Corresponds to paragraph 25 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 26 of the 1977 Model Convention was amended and renumbered as paragraph 27 (see history of paragraph 27) and paragraph 25 of the 1977 Model Convention was renumbered as paragraph 26 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on23 July 1992.

Paragraph 25 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 25 of the 1963 Draft Convention was deleted, the heading preceding paragraph 25 was moved immediately before paragraph 45 and a new paragraph 25 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 25 read as follows:

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"25. *Canada* reserves its position on paragraph 4 of this Article. When negotiating Conventions with other Member countries, the Canadian authorities would wish to alter paragraph 4 so as to reflect the Canadian position that a person acting in Canada on behalf of an enterprise of the other contracting State who has a stock of merchandise from which he regularly fills orders on behalf of the enterprise in the other Contracting state should be regarded as a permanent establishment."

Paragraph 26.1: Amended on 22 July 2010 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 28 January 2003 and until 22 July 2010, paragraph 26.1 read as follows:

"26.1 Another example is that of facilities such as cables or pipelines that cross the territory of a country. Apart from the fact that income derived by the owner or operator of such facilities from their use by other enterprises is covered by Article 6 where they constitute immovable property under paragraph 2 of Article 6, the question may arise as to whether paragraph 4 applies to them. Where these facilities are used to transport property belonging to other enterprises, subparagraph *a)*, which is restricted to delivery of goods or merchandise belonging to the enterprise that uses the facility, will not be applicable as concerns the owner or operator of these facilities. Subparagraph *e)* also will not be applicable as concerns that enterprise since the cable or pipeline is not used solely for the enterprise and its use is not of preparatory or auxiliary character given the nature of the business of that enterprise. The situation is different, however, where an enterprise owns and operates a cable or pipeline that crosses the territory of a country solely for purposes of transporting its own property and such transport is merely incidental to the business of that enterprise, as in the case of an enterprise that is in the business of refining oil and that owns and operates a pipeline that crosses the territory of a country solely to transport its own oil to its refinery located in another country. In such case, subparagraph *a)* would be applicable."

Paragraph 26.1 was added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 27: Amended on 28 January 2003, by deleting the sixth sentence, which was incorporated into new paragraph 27.1, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). After 23 July 1992 and until 28 January 2003, paragraph 27 read as follows:

"27. As already mentioned in paragraph 21 above, paragraph 4 is designed to provide for exceptions to the general definition of paragraph 1 in respect of fixed places of business which are engaged in activities having a preparatory or auxiliary character. Therefore, according to subparagraph *f)* of paragraph 4, the fact that one fixed place of business combines any of the activities mentioned in the subparagraphs *a)* to *e)* of paragraph 4 does not mean of itself that a permanent establishment exists. As long as the combined activity of such a fixed place of business is merely preparatory or auxiliary a permanent establishment should be deemed not to exist. Such combinations should not be viewed on rigid lines, but should be considered in the light of the particular circumstances. The criterion "preparatory or auxiliary character" is to be interpreted in the same way as is set out for the same criterion of subparagraph *e)* (cf. paragraphs 24 and 25 above). Subparagraph *f)* is of no importance in a case where an enterprise maintains several fixed places of business within the meaning of the subparagraphs *a)* to *e)*

provided that they are separated from each other locally and organisationally, as in such a case each place of business has to be viewed separately and in isolation for deciding the question whether or not a permanent establishment exists. States which want to allow any combination of the items mentioned in subparagraphs *a)* to *e)*, disregarding whether or not the criterion of the preparatory or auxiliary character of such a combination is met, are free to do so by deleting the words "provided" to "character" in subparagraph *f)*."

Paragraph 27 as it read after 23 July 1992 corresponded to paragraph 26 of the 1977 Model Convention. On 23 July 1992 paragraph 27 of the 1977 Model Convention was renumbered as paragraph 28 (see history of paragraph 28) and paragraph 26 of the 1977 Model Convention was renumbered as paragraph 27 and amended, by replacing the cross references to paragraphs 20, 23 and 24 with cross references to paragraphs 21, 24 and 25, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 26 read as follows:

"26. As already mentioned in paragraph 20 1 above, paragraph 4 is designed to provide for exceptions to the general definition of paragraph 1 in respect of fixed places of business which are engaged in activities having a preparatory or auxiliary character. Therefore, according to subparagraph *f)* of paragraph 4, the fact that one fixed place of business combines any of the activities mentioned in the subparagraphs *a)* to *e)* of paragraph 4 does not mean of itself that a permanent establishment exists. As long as the combined activity of such a fixed place of business is merely preparatory or auxiliary a permanent establishment should be deemed not to exist. Such combinations should not be viewed on rigid lines, but should be considered in the light of the particular circumstances. The criterion "preparatory or auxiliary character" is to be interpreted in the same way as is set out for the same criterion of subparagraph *e)* (cf. paragraphs 23 and 24 above). Subparagraph *f)* is of no importance in a case where an enterprise maintains several fixed places of business within the meaning of the subparagraphs *a)* to *e)* provided that they are separated from each other locally and organisationally, as in such a case each place of business has to be viewed separately and in isolation for deciding the question whether or not a permanent establishment exists. States which want to allow any combination of the items mentioned in subparagraphs *a)* to *e)*, disregarding whether or not the criterion of the preparatory or auxiliary character of such a combination is met, are free to do so by deleting the words "provided" to "character" in subparagraph *f)*."

Paragraph 26 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 27.1: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). Before 28 January 2003, the first sentence of paragraph 27.1 was the sixth sentence of paragraph 27 (see history of paragraph 27).

Paragraph 28: Corresponds to paragraph 27 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 28 of the 1977 Model Convention was amended and renumbered as paragraph 29 (see history of paragraph 29) and paragraph 27 was renumbered as paragraph 28 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 27 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 29: Corresponds to paragraph 28 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 29 of the 1977 Model Convention was renumbered as paragraph 30 (see history of paragraph 30) and paragraph 28 of the 1977 Model Convention was renumbered as paragraph 29 and amended, by replacing the cross-reference to "paragraph 10" of the Commentary on Article 5 with "paragraph 11", by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 28 read as follows:

> "28. If a fixed place of business under paragraph 4 is deemed not to be a permanent establishment, this exception applies likewise to the disposal of movable property forming part of the business property of the place of business at the termination of the enterprise's activity in such installation (cf. paragraph 10 above and paragraph 2 of Article 13). Since, for example, the display of merchandise is excepted under subparagraphs *a)* and *b)*, the sale of the merchandise at the termination of a trade fair or convention is covered by this exception. The exception does not, of course, apply to sales of merchandise not actually displayed at the trade fair or convention."

Paragraph 28 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 30: Corresponds to paragraph 29 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 30 of the 1977 Model Convention was amended and renumbered as paragraph 31 (see history of paragraph 31), the heading preceding paragraph 30 was moved with it and paragraph 29 of the 1977 Model Convention was renumbered as paragraph 30 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 29 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 31: Corresponds to paragraph 30 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 31 of the 1977 Model Convention was renumbered as paragraph 32 (see history of paragraph 32), paragraph 30 of the 1977 Model Convention was renumbered as paragraph 31 and amended by replacing the words "has been redrafted" with "was redrafted in the 1977 Model Convention" in the last sentence and the heading preceding paragraph 30 was moved with it, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 30 read as follows:

> "30. It is a generally accepted principle that an enterprise should be treated as having a permanent establishment in a State if there is under certain conditions a person acting for it, even though the enterprise may not have a fixed place of business in that State within the meaning of paragraphs 1 and 2. This provision intends to give that State the right to tax in such cases. Thus paragraph 5 stipulates the conditions under which an enterprise is deemed to have a permanent establishment in respect of any activity of a person acting for it. The paragraph has been redrafted to clarify the intention of the corresponding provision of the 1963 Draft Convention without altering its substance apart from an extension of the excepted activities of the person."

Paragraph 30 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 32: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on

Fiscal Affairs on 7 November 2002). After 31 March 1994 and until 28 January 2003, paragraph 32 read as follows:

> "32. Persons whose activities may create a permanent establishment for the enterprise are so-called dependent agents *i.e.* persons, whether employees or not, who are not independent agents falling under paragraph 6. Such persons may be either individuals or companies. It would not have been in the interest of international economic relations to provide that the maintenance of any dependent person would lead to a permanent establishment for the enterprise. Such treatment is to be limited to persons who in view of the scope of their authority or the nature of their activity involve the enterprise to a particular extent in business activities in the State concerned. Therefore, paragraph 5 proceeds on the basis that only persons having the authority to conclude contracts can lead to a permanent establishment for the enterprise maintaining them. In such a case the person has sufficient authority to bind the enterprise's participation in the business activity in the State concerned. The use of the term "permanent establishment" in this context presupposes, of course, that that person makes use of this authority repeatedly and not merely in isolated cases. Also, the phrase "authority to conclude contracts in the name of the enterprise" does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise."

Paragraph 32 was previously amended on 31 March 1994, by adding a sentence at the end of the paragraph, by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. After 23 July 1992 and until 31 March 1994, paragraph 32 read as follows:

> "32. Persons whose activities may create a permanent establishment for the enterprise are so-called dependent agents *i.e.* persons, whether employees or not, who are not independent agents falling under paragraph 6. Such persons may be either individuals or companies. It would not have been in the interest of international economic relations to provide that the maintenance of any dependent person would lead to a permanent establishment for the enterprise. Such treatment is to be limited to persons who in view of the scope of their authority or the nature of their activity involve the enterprise to a particular extent in business activities in the State concerned. Therefore, paragraph 5 proceeds on the basis that only persons having the authority to conclude contracts can lead to a permanent establishment for the enterprise maintaining them. In such a case the person has sufficient authority to bind the enterprise's participation in the business activity in the State concerned. The use of the term "permanent establishment" in this context presupposes, of course, that that person makes use of this authority repeatedly and not merely in isolated cases."

Paragraph 32 as it read after 23 July 1992 corresponded to paragraph 31 of the 1977 Model Convention. On 23 July 1992 paragraph 32 of the 1977 Model Convention was renumbered as paragraph 33 (see history of paragraph 33) and paragraph 31 of the 1977 Model Convention was renumbered as paragraph 32 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 31 of the 1977 Model Convention corresponded to paragraph 16 of the 1963 Draft Convention. Paragraph 16 of the 1963 Draft Convention was amended and renumbered when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 16 read as follows:

> "16. Having thus excluded the independent agents from the term "permanent establishments", it would likewise not be in the interest of international economic relations to treat all dependent agents as being permanent establishments. Treatment as a permanent establishment should be limited to dependent agents of those enterprises which, in view of the scope of their agent's authority or of the nature of their agent's business dealings, take part to a particular extent in business activities in the other State. Therefore, the Article proceeds on the basis that only persons having the authority to conclude contracts shall be treated as permanent establishments. The term "general authority" which has been commonly used in bilateral Conventions has been abandoned and replaced simply by the term "authority". In practice, it seems unlikely that any dependent agents have a completely unfettered authority to conclude contracts. In all cases the authority must be to some extent circumscribed. For administrative reasons, it seems advisable to avoid the difficulties which would inevitably arise if the question whether or not the dependent agent is a permanent establishment had to be decided by reference to the precise extent of his authority. When the agent has sufficient authority to bind the enterprise's participation in the business activity of the other country is such that the agent should be deemed to be a permanent establishment. The use of the term "permanent establishment" in relation to a person, presupposes, of course, that that person makes use of his authority repeatedly and not merely in isolated cases."

Paragraph 32.1: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 33: Amended on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 23 July 1992 and until 15 July 2005, paragraph 33 read as follows:

> "33. The authority to conclude contracts must cover contracts relating to operations which constitute the business proper of the enterprise. It would be irrelevant, for instance, if the person had authority to engage employees for the enterprise to assist that person's activity for the enterprise or if the person were authorised to conclude, in the name of the enterprise, similar contracts relating to internal operations only. Moreover the authority has to be habitually exercised in the other State; whether or not this is the case should be determined on the basis of the commercial realities of the situation. A person who is authorised to negotiate all elements and details of a contract in a way binding on the enterprise can be said to exercise this authority "in that State", even if the contract is signed by another person in the State in which the enterprise is situated. Since, by virtue of paragraph 4, the maintenance of a fixed place of business solely for purposes listed in that paragraph is deemed not to constitute a permanent establishment, a person whose activities are restricted to such purposes does not create a permanent establishment either."

Paragraph 33 as it read after 23 July 1992 corresponded to paragraph 32 of the 1977 Model Convention. On 23 July 1992 paragraph 33 of the 1977 Model Convention was renumbered as paragraph 34 (see history of paragraph 34) and paragraph 32 of the 1977 Model Convention was renumbered as paragraph 33 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 32 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 33.1: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 34: Corresponds to paragraph 33 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 34 of the 1977 Model Convention was renumbered as paragraph 35 (see history of paragraph 35) and paragraph 33 of the 1977 Model Convention was renumbered as paragraph 34 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 33 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 35: Corresponds to paragraph 34 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 35 of the 1977 Model Convention was amended and renumbered as paragraph 36 (see history of paragraph 36), the heading preceding paragraph 35 was moved with it and paragraph 34 of the 1977 Model Convention was renumbered as paragraph 35, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 34 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 36: Corresponds to paragraph 35 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 36 of the 1977 Model Convention was amended and renumbered as paragraph 37 (see history of paragraph 37) and paragraph 35 of the 1977 Model Convention was renumbered as paragraph 36 and amended, by replacing the cross reference therein to "paragraph 31" with a cross reference to "paragraph 32", by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. At the same time, the heading preceding paragraph 35 was moved immediate before paragraph 36. In the 1977 Model Convention and until 23 July 1992, paragraph 35 read as follows:

> "35. Where an enterprise of a Contracting State carries on business dealings through a broker, general commission agent or any other agent of an independent status, it cannot be taxed in the other Contracting State in respect of those dealings if the agent is acting in the ordinary course of his business (cf. paragraph 31 above). Although it stands to reason that such an agent, representing a separate enterprise, cannot constitute a permanent establishment of the foreign enterprise, paragraph 6 has been inserted in the Article for the sake of clarity and emphasis."

Paragraph 35 of the 1977 Model Convention corresponded to paragraphs 20 and 21 of the 1963 Draft Convention. Paragraphs 20 and 21 of the 1963 Draft Convention were amended and incorporated into paragraph 35 when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, the headings preceding paragraph 20 of the 1963 Draft Convention were amended and moved immediately before paragraph 35. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraphs 20 and 21 and the headings preceding paragraph 20 read as follows:

> "*Paragraph* 5
>
> INDEPENDENT AGENTS
>
> 20. Where the enterprise carries on business dealings through an agent of an independent status, it cannot be taxed in the other Contracting State (cf. the reasons given in paragraph 15 above). Corresponding provisions are included in the Mexico and London Drafts (Article V, paragraph 5, of the Protocol) and in numerous other Conventions for the avoidance of double taxation. In the Mexico and London

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Drafts and in the Conventions, brokers and commission agents are stated to be agents of an independent status. Similarly, business dealings carried on with the co-operation of a any other independent person carrying on a trade or business (*e.g.* a forwarding agent) do not constitute a permanent establishment. Such independent agents must, however, be acting in the ordinary course of their business. Where, for example, a commission agent not only sells the goods or merchandise of the enterprise in his own name but also habitually acts, in relation to that enterprise, as a permanent agent having an authority to conclude contracts, he would be deemed in respect of this particular activity to be a permanent establishment since he is thus acting outside the ordinary course of his own trade or business (namely that of a commission agent).

21. Although it stands to reason that agents of an independent status, representing as they do a separate enterprise, cannot constitute a permanent establishment of the foreign enterprise where they are acting in the ordinary course of their business (cf. paragraph 15 of the present Commentary), paragraph 5 is retained in the Article for the sake of clarity and emphasis especially since a similar provision is contained in nearly all of the double taxation Conventions so far concluded."

Paragraph 37: Corresponds to paragraph 36 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 37 of the 1977 Model Convention was renumbered as paragraph 38 (see history of paragraph 38) and paragraph 36 was renumbered as paragraph 37 and amended by replacing the word "this" with "his" in subparagraph *b)* thereof by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 36 read as follows:

"36. A person will come within the scope of paragraph 6, i.*e.* he will not constitute a permanent establishment of the enterprise on whose behalf he acts only if:

a) he is independent of the enterprise both legally and economically, and

b) he acts in the ordinary course of this business when acting on behalf of the enterprise."

Paragraph 36 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 38: Amended on 28 January 2003 by deleting the fourth sentence and incorporating the fifth and subsequent sentences into new paragraph 38.7, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). After 23 July 1992 and until 28 January 2003, paragraph 38 read as follows:

"38. Whether a person is independent of the enterprise represented depends on the extent of the obligations which this person has vis-à-vis the enterprise. Where the person's commercial activities for the enterprise are subject to detailed instructions or to comprehensive control by it, such person cannot be regarded as independent of the enterprise. Another important criterion will be whether the entrepreneurial risk has to be borne by the person or by the enterprise the person represents. A subsidiary is not to be considered dependent on its parent company solely because of the parent's ownership of the share capital. Persons cannot be said to act in the ordinary course of their own business if, in place of the enterprise, such persons perform activities which, economically, belong to the sphere of the enterprise rather than to that of their own business operations. Where, for example, a commission agent not only sells the goods or merchandise of the enterprise in his own name but also habitually acts, in relation to that enterprise,

as a permanent agent having an authority to conclude contracts, he would be deemed in respect of this particular activity to be a permanent establishment, since he is thus acting outside the ordinary course of his own trade or business (namely that of a commission agent), unless his activities are limited to those mentioned at the end of paragraph 5."

Paragraph 38 as it read after 23 July 1992 corresponded to paragraph 37 of the 1977 Model Convention. On 23 July 1992 paragraph 38 of the 1977 Model Convention was renumbered as paragraph 39 (see history of paragraph 39) and paragraph 37 of the 1977 Model Convention was renumbered as paragraph 38 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 37 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 38.1: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 38.2: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 38.3: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 38.4: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 38.5: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 38.6: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 38.7: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002). Paragraph 38.7 corresponds to the fifth and subsequent sentences of paragraph 38 (see history of paragraph 38) as they read before 28 January 2003.

Paragraph 38.8: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003, on the

basis of another report entitled "Issues Arising under Article 5 (Permanent Establishment) of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 7 November 2002).

Paragraph 39: Corresponds to paragraph 38 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 39 of the 1977 Model Convention was renumbered as paragraph 40 (see history of paragraph 40), the heading preceding paragraph 39 was moved with it and paragraph 38 of the 1977 Model Convention was renumbered as paragraph 39 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 38 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 40: Corresponds to paragraph 39 of the 1977 Model Convention as it read before 23 July 1992. On that date paragraph 40 of the 1977 Model Convention was renumbered as paragraph 41 (see history of paragraph 41), paragraph 39 of the 1977 Model Convention was renumbered as paragraph 40 and the heading preceding paragraph 39 was moved with it by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 39 of the 1977 Model Convention corresponded to paragraph 22 of the 1963 Draft Convention. Paragraph 22 of the 1963 Draft Convention was amended and renumbered as paragraph 40 when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 22 and the preceding headings read as follows:

> *"Paragraph 6*
>
> SUBSIDIARY COMPANIES
>
> 22. The Mexico and London Drafts (Article V, paragraph 8, of the Protocol) and numerous Conventions for the avoidance of double taxation, provide that the existence of a subsidiary company does not, of itself, constitute that subsidiary company a permanent establishment of its parent company. This follows, from the principle that, for the purpose of taxation, such a subsidiary company constitutes an independent legal entity. Even the fact that the trade or business carried on by the subsidiary company is managed by the parent company does not constitute the subsidiary company a permanent establishment of the parent company."

Paragraph 41: Amended on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 23 July 1992 and until 15 July 2005, paragraph 41 read as follows:

> "41. However, a subsidiary company will constitute a permanent establishment for its parent company under the same conditions stipulated in paragraph 5 as are valid for any other unrelated company, *i.e.* if it cannot be regarded as an independent agent in the meaning of paragraph 6, and if it has and habitually exercises an authority to conclude contracts in the name of the parent company. And the effects would be the same as for any other unrelated company to which paragraph 5 applies."

Paragraph 41 as it read after 23 July 1992 corresponded to paragraph 40 of the 1977 Model Convention. On 23 July 1992 paragraph 41 of the 1977 Model Convention was renumbered as paragraph 42 (see history of paragraph 42) and paragraph 40 of the 1977 Model Convention was renumbered as paragraph 41 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 40 of the 1977 Model Convention corresponded to paragraph 23 of the 1963 Draft Convention. Paragraph 23 of the 1963 Draft Convention was amended and renumbered as paragraph 40 when the 1977 Model Convention was adopted by the

OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 23 read as follows:

> "23. Where, however, the subsidiary company, on behalf of its parent company, carries on an activity within the provisions of paragraph 4 of the Article, that subsidiary company is deemed to be a permanent establishment of the parent company. Where, for example, the subsidiary company, on the strength of an authority, concludes contracts of sale in the name of the parent company, the subsidiary company will be treated as a permanent establishment of the parent company (but only in respect of such activities). The parent company is subject to tax on so much of the profits accruing from such sales as is attributable to that permanent establishment. This does not affect the separate taxation of the subsidiary company's own profits."

Paragraph 41.1: Added on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005.

Paragraph 42: Replaced on 15 July 2005 when paragraph 42 was deleted and a new paragraph 42 was added by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 23 July 1992 and until 15 July 2005, paragraph 42 read as follows:

> "42. The same rules should apply to activities which one subsidiary carries on for any other subsidiary of the same company."

Paragraph 42 as it read after 23 July 1992 corresponded to paragraph 41 of the 1977 Model Convention. On 23 July 1992 paragraph 42 of the 1977 Model Convention was deleted, the heading preceding paragraph 42 was moved immediately before paragraph 43 and paragraph 41 of the 1977 Model Convention was renumbered as paragraph 42 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 41 of the 1977 Model Convention corresponded to paragraph 24 of the 1963 Draft Convention. Paragraph 24 of the 1963 Draft Convention was amended and renumbered paragraph 41 when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 24 read as follows:

> "24. For the same reasons, a parent company should not be treated as constituting a permanent establishment of its subsidiary unless it fulfills the conditions set out in paragraph 4 of the Article. The same rules should apply to two or more subsidiaries of the same company."

In the 1977 Model Convention and until it was deleted on 23 July 1992, paragraph 42 read as follows:

> "42. Treatment in Irish tax law of non-resident operators in *Ireland* and in the Irish continental shelf area. Profits arising to a person not resident in Ireland from exploration or exploitation activities in Ireland or in the Irish continental shelf area as well as profits from exploration or exploitation rights are treated as the profits of a trade carried on in Ireland through a branch or agency and are, in consequence, taxable in Ireland. This includes non-resident contractors who supply well-drilling, pipe-laying and similar services in Ireland or in the Irish continental shelf area. In addition, capital gains accruing on the disposal of exploration or exploitation rights in Ireland or in the Irish continental shelf area are treated as gains accruing on the disposal of assets situated in Ireland. When negotiating conventions with other member countries, Ireland would wish subparagraph *f)* of paragraph 2 to be so drafted and interpreted as to reflect the Irish position."

Paragraph 42 of the 1977 Model Convention was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 42.1: Added on 28 January 2003, together with the heading preceding it, by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.2: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.3: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.4: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.5: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.6: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.7: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.8: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.9: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.10: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 42.11: Added on 17 July 2008, together with the heading preceding it, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.12: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.13: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.14: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.15: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.16: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.17: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.18: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.19: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.20: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.21: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.22: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.23: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.24: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.25: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.26: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.27: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.28: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.29: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.30: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.31: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.32: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.33: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.34: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.35: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.36: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.37: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.38: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.39: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.40: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.41: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.42: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.43: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.44: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

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Paragraph 42.45: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.46: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.47: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 42.48: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 43: Replaced on 22 July 2010 when paragraph 43 was deleted and a new paragraph 43 was added by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 23 July 1992 and until 22 July 2010, paragraph 43 read as follows:

> "43. *Italy* does not adhere to the interpretation given in paragraph 12 above concerning the list of examples of paragraph 2. In its opinion, these examples can always be regarded as constituting *a priori* permanent establishments."

Paragraph 43 was amended on 23 July 1992, by replacing the reference therein to "paragraph 11" with a reference to "paragraph 12", by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. At the same time, the heading preceding paragraph 42 was moved immediately before paragraph 43. In the 1977 Model Convention and until 23 July 1992, paragraph 43 read as follows:

> "43. *Italy* does not adhere to the interpretation given in paragraph 11 above concerning the list of examples of paragraph 2. In its opinion, these examples can always be regarded as constituting *a priori* permanent establishments."

Paragraph 43 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

The footnote to the heading "Observations on the Commentary" preceding paragraph 43 was deleted on 22 July 2010 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 17 July 2008 and until 22 July 2010, the footnote read as follows:

> "1 At the time of approval of paragraphs 42.11 to 42.13 above by the Committee, France, Spain, Sweden, Switzerland and the United States, which among others agree with the Committee's conclusions set out in these paragraphs and do not share the views of some States expressed in paragraphs 42.14 to 42.17, have asked that their position on this issue be expressly stated in the OECD Model Tax Convention."

The footnote to the heading "Observations on the Commentary" preceding paragraph 43 was added on 17 July 2008, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 44: Amended on 28 January 2003, by adding the Slovak Republic as a country making the reservation, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 23 October 1997 and until 28 January 2003, paragraph 44 read as follows:

> "44. The *Czech Republic* would add to paragraph 25 its view that when an enterprise has established an office (such as a commercial representation office) in a country, and the employees working at that office are substantially involved in the negotiation of contracts for the import of products or services into that country, the office will in most cases not fall within paragraph 4 of Article 5. Substantial involvement in the negotiations exists when the essential parts of the contract — the type, quality, and amount of goods, for example, and the time and terms of delivery — are determined by the office. These activities form a separate and

indispensable part of the business activities of the foreign enterprise, and are not simply activities of an auxiliary or preparatory character."

Paragraph 44 was added on 23 October 1997 by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997.

Paragraph 44, as it read before 31 March 1994, was amended and renumbered as paragraph 56 (see history of paragraph 53) by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994.

Paragraph 45: Amended on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 21 September 1995 and until 28 January 2003, paragraph 45 read as follows:

"45. *Mexico* wishes to include some wording in its conventions to emphasize that the arm's length principle should be considered in determining whether or not an agent is of independent status."

Paragraph 45 was added on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 45 as it read before 31 March 1994 was deleted by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. After 23 July 1992 and until 31 March 1994, paragraph 45 read as follows:

"45. The *United Kingdom* considers that an agent who is not an agent of independent status within paragraph 6 of this Article and who has the characteristics described in paragraphs 32 and 33 above will represent a permanent establishment of an enterprise if he has the authority to conclude contracts on behalf of that enterprise whether in his own name or that of the enterprise."

Paragraph 45 was replaced on 23 July 1992 when paragraph 45 of the 1977 Model Convention was renumbered as paragraph 46 (see history of paragraph 46) and a new paragraph 45 was added, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. At the same time, the heading preceding paragraph 45 was moved with it.

Paragraph 45.1: Added on 15 July 2014 by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014.

Paragraph 45.1 as it read before 15 July 2005 was deleted by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 23 October 1997 and until 15 July 2005, paragraph 45.1 read as follows:

"45.1 *Hungary* is of the opinion that an agent, whether commission agent or not, should be of an independent status within the sense of the Convention."

Paragraph 45.1 was added on 23 October 1997 by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997.

Paragraph 45.2: Added on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000.

Paragraph 45.3: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 45.4: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 45.5: Added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 45.6: Replaced on 22 July 2010 when paragraph 45.6 was deleted and a new paragraph 45.6 was added by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 17 July 2008 and until it was deleted on 22 July 2010, paragraph 45.6 read as follows:

> "45.6 *Spain* has expressed a number of reservations on the Report "Clarification of the permanent establishment definition in e-commerce". *Greece* and *Spain* have some doubts concerning the opportunity of introducing paragraphs 42.1 to 42.10 of the Commentary in the Model at this time. Since the OECD continues the study of e-commerce taxation, these States will not necessarily take into consideration the aforementioned paragraphs until the OECD has come to a final conclusion."

Paragraph 45.6 was amended on 17 July 2008, by deleting Portugal from the list of countries making the reservation, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 28 January 2003 and until 17 July 2008, paragraph 45.6 read as follows:

> "45.6 *Spain* and *Portugal* have expressed a number of reservations on the Report "Clarification of the permanent establishment definition in e-commerce". *Greece*, *Spain* and *Portugal* have some doubts concerning the opportunity of introducing paragraphs 42.1 to 42.10 of the Commentary in the Model at this time. Since the OECD continues the study of e-commerce taxation, these States will not necessarily take into consideration the aforementioned paragraphs until the OECD has come to a final conclusion."

Paragraph 45.6 was added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 45.7: Added on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005.

Paragraph 45.8: Added on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005.

Paragraph 45.9: Added on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005.

Paragraph 45.10: Added on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005.

Paragraph 45.11: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 46: Amended on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 15 July 2005 and until 17 July 2008, paragraph 46 read as follows:

> "46. *Australia* reserves the right to treat an enterprise as having a permanent establishment in a State if it carries on activities relating to natural resources or operates substantial equipment in that State with a certain degree of continuity, or a person — acting in that State on behalf of the enterprise — manufactures or processes in that State goods or merchandise belonging to the enterprise."

Paragraph 46 was previously amended on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 23 July 1992 and until 15 July 2005, paragraph 46 read as follows:

> "46. *Australia* reserves the right to treat an enterprise as having a permanent establishment in a State if the enterprise carries on designated supervisory activities in that State for more than twelve months, if substantial equipment is used in that State for more than twelve months by, for or under contract with the enterprise in the exploration for or exploitation of natural resources, or if a person

— acting in that State on behalf of the enterprise — manufactures or processes there goods or merchandise belonging to the enterprise."

Paragraph 46 as it read after 23 July 1992 corresponded to paragraph 45 of the 1977 Model Convention. On 23 July 1992 paragraph 46 of the 1977 Model Convention was renumbered as paragraph 47 (see history of paragraph 57), paragraph 45 of the 1977 Model Convention was renumbered as paragraph 46 and the heading preceding paragraph 45 was moved with it by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 45 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, the heading preceding paragraph 25 was moved immediately before paragraph 45.

Paragraph 47: Corresponds to paragraph 52 as it read before 22 July 2010. On that date paragraph 47 was amended and renumbered as paragraph 57 (see history of paragraph 57) and paragraph 52 was renumbered as paragraph 47 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 52 was amended on 28 January 2003, by adding Canada to the list of countries making the reservation, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 21 September 1995 and until 28 January 2003, paragraph 52 read as follows:

"52. Considering the special problems in applying the provisions of the Model Convention to offshore hydrocarbon exploration and exploitation and related activities, *Denmark*, *Ireland*, *Norway* and the *United Kingdom* reserve the right to insert in a special article provisions relating to such activities."

Paragraph 52 was previously amended on 21 September 1995, by adding Ireland to the list of countries making the reservation, by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995. After 31 March 1994 and until 21 September 1995, paragraph 52 read as follows:

"52. Considering the special problems in applying the provisions of the Model Convention to offshore hydrocarbon exploration and exploitation and related activities, *Denmark*, *Norway* and the *United Kingdom* reserve the right to insert in a special article provisions relating to such activities."

Paragraph 52 was previously amended on 31 March 1994, by adding United Kingdom to the list of countries making the reservation, by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. After 23 July 1992 and until 31 March 1994, paragraph 52 read as follows:

"52. Considering the special problems in applying the provisions of the Model Convention to offshore hydrocarbon exploration and exploitation and related activities, *Denmark* and *Norway* reserve the right to insert in a special article provisions relating to such activities."

Paragraph 52 was added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 48: Replaced paragraph 48 on 22 July 2010 when paragraph 48 was amended and renumbered as paragraph 65 (see history of paragraph 65) and a new paragraph 48 was added, by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 49: Corresponds to paragraph 60 as it read before 22 July 2010. On that date paragraph 49 was deleted and paragraph 60 was renumbered as paragraph 49 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 60 was amended on 28 January 2003, by adding the Slovak Republic as a country making the reservation, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 23 October 1997 and until 28 January 2003, paragraph 58 read as follows:

> "60. The *Czech Republic*, while agreeing with the "fixed place of business" requirement of paragraph 1, reserves the right to propose in bilateral negotiations specific provisions clarifying the application of this principle to arrangements for the performance of services over a substantial period of time."

Paragraph 60 was added on 23 October 1997 by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997.

Paragraph 49, as it read before 22 July 2010, was deleted by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 23 July 1992 and until 22 July 2010, paragraph 49 read as follows:

> "49. *Spain* reserves its position on paragraph 3 so as to be able to tax an enterprise having a permanent establishment in Spain, even if the site of the construction or installation project does not last for more than twelve months, where the activity of this enterprise in Spain presents a certain degree of permanency within the meaning of paragraphs 1 and 2. Spain also reserves its right to tax an enterprise as having a permanent establishment in Spain when such an enterprise carries on supervisory activities in Spain for more than 12 months in connection with a building site or construction or installation project also lasting more than 12 months."

Paragraph 49 as it read after 23 July 1992 corresponded to paragraph 48 of the 1977 Model Convention. On 23 July 1992 paragraph 48 of the 1977 Model Convention was amended and renumbered as paragraph 49 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 48 read as follows:

> "48. *Spain* reserves its position on paragraph 3 so as to be able to tax an enterprise having a permanent establishment in Spain, even if the site of the construction or installation project does not last for more than twelve months, where the activity of this enterprise in Spain presents a certain degree of permanency within the meaning of paragraphs 1 and 2."

Paragraph 48 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 50: Added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 51: Corresponds to paragraph 57 as it read before 22 July 2010. On that date paragraph 51 was renumbered as paragraph 56 (see history of paragraph 56) and paragraph 57 was renumbered as paragraph 51 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 57 was added on 21 September 1995, by the report entitled "The 1995 Update to the Model Tax Convention" adopted by the OECD Council on 21 September 1995.

Paragraph 52: Amended on 15 July 2014, by adding Estonia as a country making the reservation, by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014. After 22 July 2010 and until 15 July 2014, paragraph 52 read as follows:

> "52. *Mexico* reserves the right to tax individuals performing professional services or other activities of an independent character if they are present in Mexico for a period or periods exceeding in the aggregate 183 days in any twelve month period."

Paragraph 52 as it read after 22 July 2010 corresponded to paragraph 64. On 22 July 2010 paragraph 52 was renumbered as paragraph 47 (see history of paragraph 47) and paragraph 64 was renumbered as paragraph 52 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 64 was added on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000.

Paragraph 53: Corresponds to paragraph 56 as it read before 22 July 2010. On that date paragraph 53 was amended and renumbered as paragraph 60 (see history of paragraph 60) and paragraph 56 was renumbered as paragraph 53 by the report entitled the "2010 Update to the Model Tax Convention" adopted by the OECD Council on 22 July 2010.

Paragraph 56 was amended on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 29 April 2000 and until 17 July 2008, paragraph 56 read as follows:

> "56. *New Zealand* reserves the right to insert provisions that deem a permanent establishment to exist if, for more than six months, an enterprise conducts activities relating to the exploration or exploitation of natural resources, uses or leases substantial equipment or furnishes services (including consultancy and independent personal services)."

Paragraph 56 was previously amended on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000. After 31 March 1994 and until 29 April 2000, paragraph 56 read as follows:

> "56. *New Zealand* reserves the right to negotiate the addition of specific provisions deeming an enterprise in some particular situations to have a permanent establishment in New Zealand."

Paragraph 56 as it read after 31 March 1994 corresponded to paragraph 44 of the 1977 Model Convention. On 31 March 1994 paragraph 44 of the 1977 Model Convention was amended and renumbered as paragraph 56 by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. In the 1977 Model Convention and until 31 March 1994, paragraph 44 read as follows:

> "44. While, subject to its reservations in relation to this Article, *New Zealand*, for the purpose of negotiating conventions with other member countries, accepts, in general, the principles of this Article, it would wish to be free to negotiate for the addition of specific provisions deeming an enterprise in some particular situations to have a permanent establishment in New Zealand."

Paragraph 44 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 54: Corresponds to paragraph 55 as it read before 22 July 2010. On that date paragraph 54 was renumbered as paragraph 64 (see history of paragraph 64) and paragraph 55 was renumbered as paragraph 54 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 55 was amended on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 29 April 2000 and until 17 July 2008, paragraph 55 read as follows:

> "55. *Turkey* reserves the right to treat a person as having a permanent establishment in Turkey if the person performs professional services and other activities of independent character, including planning, supervisory or consultancy activities, with a certain degree of continuity."

Paragraph 55 was previously amended on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000. After 23 July 1992 and until 29 April 2000, paragraph 55 read as follows:

> "55. *Turkey* reserves the right to treat an enterprise as having a permanent establishment in Turkey if the enterprise carries on planning, supervisory or consultancy activities in connection with a building site or construction or installation project lasting more than six months."

Paragraph 55 was added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 55: Amended on 15 July 2014, by adding Israel to the list of countries making the reservation, by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014. After 22 July 2010 and until 15 July 2014, paragraph 55 read as follows:

> "55. *Canada* and *Chile* reserve the right in subparagraph 2 *f)* to replace the words "of extraction" with the words "relating to the exploration for or the exploitation"."

Paragraph 55 as it read after 22 July 2010 corresponded to paragraph 63. On 22 July 2010 paragraph 55 was renumbered as paragraph 54 (see history of paragraph 54) and paragraph 63 was amended, by adding Chile as a country making the reservation, and renumbered as paragraph 55 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. At the same time, the heading preceding paragraph 55 was added. After 29 April 2000 and until 22 July 2010, paragraph 63 read as follows:

> "63. *Canada* reserves the right in subparagraph 2 *f)* to replace the words "of extraction" with the words "relating to the exploration for or the exploitation""

Paragraph 63 was added on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000.

Paragraph 56: Corresponds to paragraph 51 as it read before 22 July 2010. On that date paragraph 56 as it read before 22 July 2010 was renumbered as paragraph 53 (see history of paragraph 53) and paragraph 51 was renumbered as paragraph 56 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 51 was amended on 23 October 1997 by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997. After 23 July 1992 and until 23 October 1997, paragraph 51 read as follows:

> "51. *Greece* for the purpose of negotiating Conventions with other member countries would wish to be free to propose paragraph 2 of Article 5 as it is drafted in the 1963 Draft Convention."

Paragraph 51 was added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 57: Corresponds to paragraph 47 as it read before 22 July 2010. On that date paragraph 57 was renumbered as paragraph 51 (see history of paragraph 51) and paragraph 47 was amended, by adding Chile to the list of countries making the reservation, and renumbered as paragraph 57 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. At the same time, the heading preceding paragraph 57 was added. After 15 July 2005 and until 22 July 2010, paragraph 47 read as follows:

> "47. *Australia*, *Greece*, *Korea*, *New Zealand*, *Portugal* and *Turkey* reserve their positions on paragraph 3, and consider that any building site or construction or

installation project which lasts more than six months should be regarded as a permanent establishment."

Paragraph 47 was previously amended on 15 July 2005, by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 23 October 1997 and until 15 July 2005, paragraph 47 read as follows:

"47. *Greece*, *Korea*, *New Zealand*, *Portugal* and *Turkey* reserve their positions on paragraph 3, and consider that any building site or construction or installation project which lasts more than six months should be regarded as a permanent establishment."

Paragraph 47 was previously amended on 23 October 1997, by adding Korea to the list of countries making the reservation, by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997. After 23 July 1992 and until 23 October 1997, paragraph 47 read as follows:

"47. *Greece*, *New Zealand*, *Portugal* and *Turkey* reserve their positions on paragraph 3, and consider that any building site or construction or installation project which lasts more than six months should be regarded as a permanent establishment."

Paragraph 47 as it read after 23 July 1992 corresponded to paragraph 46 of the 1977 Model Convention. On 23 July 1992 paragraph 47 of the 1977 Model Convention was renumbered as paragraph 48 (see history of paragraph 48) and paragraph 46 of the 1977 Model Convention was renumbered as paragraph 47 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 46 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 58: Replaced on 22 July 2010 when paragraph 58 was renumbered as paragraph 62 (see history of paragraph 62) and a new paragraph was added by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 59: Corresponds to paragraph 62 as it read before 22 July 2010. On that date paragraph 59 was renumbered as paragraph 61 (see history of paragraph 61) and paragraph 62 was renumbered as paragraph 59 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 62 was added on 23 October 1997 by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997.

Paragraph 60: Corresponds to paragraph 53 as it read before 22 July 2010. On that date paragraph 60 was renumbered as paragraph 49 (see history of paragraph 49) by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. At the same time, paragraph 53 was amended, by adding Slovenia and deleting Norway, and renumbered as paragraph 60. After 17 July 2008 and until 22 July 2010, paragraph 53 read as follows:

"53. *Norway* reserves the right to include connected supervisory or consultancy activities in paragraph 3 of the Article."

Paragraph 53 was previously amended on 17 July 2008, by deleting Australia from the list of countries making the reservation, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 15 July 2005 and until 17 July 2008, paragraph 53 read as follows:

"53. *Australia* and *Norway* also reserve the right to include connected supervisory or consultancy activities in paragraph 3 of the Article. *Australia* also reserves the right to add use of substantial equipment for rental or other purposes to the list of activities covered by paragraph 3."

Paragraph 53 was previously amended on 15 July 2005, by adding Australia as a country making the reservation, by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 23 July 1992 and until 15 July 2005, paragraph 53 read as follows:

> "53. *Norway* also reserves the right to include connected supervisory or consultancy activities in paragraph 3 of the Article."

Paragraph 53 was added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 61: Corresponds to paragraph 59 as it read before 22 July 2010. On that date paragraph 61 was amended and renumbered as paragraph 63 (see history of paragraph 63) and paragraph 59 was renumbered as paragraph 61 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 59 was amended on 28 January 2003, by adding the Slovak Republic as a country making the reservation, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 21 September 1995 and until 28 January 2003, paragraph 59 read as follows:

> "59. *Mexico* reserves the right to tax an enterprise that carries on supervisory activities for more than six months in connection with a building site or a construction, assembly, or installation project."

Paragraph 59 was added on 21 September 1995, by the report entitled "The 1995 Update to the Model Tax Convention" adopted by the OECD Council on 21 September 1995.

Paragraph 62: Corresponds to paragraph 58 as it read before 22 July 2010. On that date paragraph 62 was renumbered as paragraph 59 (see history of paragraph 59) and paragraph 58 was renumbered as paragraph 62 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 58 was amended on 28 January 2003, by adding the Slovak Republic as a country making the reservation, by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 21 September 1995 and until 28 January 2003, paragraph 58 read as follows:

> "58. *Mexico* reserves its position on paragraph 3 and considers that any building site or construction, assembly, or installation project that lasts more than six months should be regarded as a permanent establishment."

Paragraph 58 was added on 21 September 1995, by the report entitled "The 1995 Update to the Model Tax Convention" adopted by the OECD Council on 21 September 1995.

Paragraph 63: Corresponds to paragraph 61 as it read before 22 July 2010. On that date paragraph 63 was renumbered and amended as paragraph 55 (see history of paragraph 55) and paragraph 61 was amended and renumbered as paragraph 63 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 61 was added on 23 October 1997 by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997.

Paragraph 64: Corresponds to paragraph 54 as it read before 22 July 2010. On that date paragraph 64 was renumbered as paragraph 52 (see history of paragraph 52) and paragraph 54 was renumbered as paragraph 64 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 54 was amended on 17 July 2008, by deleting the last sentence, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD

Council on 17 July 2008. After 23 July 1992 and until 17 July 2008, paragraph 54 read as follows:

> "54. *Portugal* reserves the right to treat an enterprise as having a permanent establishment in Portugal if the enterprise carries on an activity consisting of planning, supervising, consulting, any auxiliary work or any other activity in connection with a building site or construction or installation project lasting more than six months, if such activities or work also last more than six months. Portugal also reserves the right to consider that a permanent establishment exists if the activity of the enterprise is carried on with a certain degree of continuity by employees or any other personnel under contract."

Paragraph 54 was added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 65: Corresponds to paragraph 48 as it read before 22 July 2010. On that date paragraph 65 was renumbered as paragraph 67 (see history of paragraph 67) and paragraph 48 was amended and renumbered as paragraph 65 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 29 April 2000 and until 22 July 2010, paragraph 48 read as follows:

> "48. The *United States* reserves the right to add "a drilling rig or ship used for the exploration of natural resources" to the activities covered by the 12 month threshold test in paragraph 3."

Paragraph 48 was replaced on 29 April 2000 when it was deleted and a new paragraph 48 was added by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000. After 23 October 1997 and until 29 April 2000, paragraph 48 read as follows:

> "48. *Korea* and *New Zealand* also reserve the right to tax an enterprise that carries on supervisory activities for more than six months in connection with a building site or construction or installation project lasting more than six months, and also, in the case of New Zealand, an enterprise where substantial equipment or machinery is being used by, for, or under contract with the enterprise."

Paragraph 48 was amended on 23 October 1997, by adding Korea as a country making the reservation, by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997. After 21 September 1995 and until 23 October 1997, paragraph 48 read as follows:

> "48. *New Zealand* also reserves the right to tax an enterprise that carries on supervisory activities for more than six months in connection with a building site or construction or installation project lasting more than six months, and also an enterprise where substantial equipment or machinery is being used by, for, or under contract with the enterprise."

Paragraph 48 was previously amended on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention" adopted by the OECD Council on 21 September 1995. After 23 July 1992 and until 21 September 1995, paragraph 48 read as follows:

> "48. *New Zealand* also reserves its position so as to be able to tax an enterprise which carries on supervisory activities for more than six months in connection with a building site or construction or installation project lasting more than six months, and also an enterprise where substantial equipment or machinery is for more than six months being used by, for or under contract with the enterprise."

Paragraph 48 as it read after 23 July 1992 corresponded to paragraph 47 of the 1977 Model Convention. On 23 July 1992 paragraph 48 of the 1977 Model Convention was amended and renumbered as paragraph 49 (see history of paragraph 49) and paragraph 47 of the 1977 Model Convention was renumbered as paragraph 48 by the

report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 47 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 66: Added on 22 July 2010, together with the preceding heading, by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 67: Corresponds to paragraph 65 as it read before 22 July 2010. On that date paragraph 65 was renumbered as paragraph 67 by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.

Paragraph 65 was added on 28 January 2003 by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003.

Paragraph 68: Amended on 15 July 2014, by adding Estonia as a country making the reservation, by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014. After 22 July 2010 and until 15 July 2014, paragraph 68 read as follows:

> "68. *Slovenia* reserves the right to amend paragraph 6 to make clear that an agent whose activities are conducted wholly or almost wholly on behalf of a single enterprise will not be considered an agent of an independent status."

Paragraph 68 was added on 22 July 2010, together with the preceding heading, by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010.